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Medical Malpractice Screening Panels

Assembly Committee on Judiciary

ASSEMBLY COMMITTEE ON JUDICIARY

MEDICAL MALPRACTICE SCREENING PANELS

Hearing of October 14, 1980
State Capitol
Room 2117
Sacramento, California

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SUBJECT: Medical Malpractice Screening Panels

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CHAIRMAN JACK R. FENTON: The subject of today's hearing is the use of pre-trial screening panels in medical malpractice litigation. The hearing will focus on AB 2919 by Assemblyman Leroy Greene which would require that a medical injury claim against a physician or surgeon be submitted to and reviewed by a three person screening panel prior to a medical malpractice complaint being filed with the courts.

Thirty states have established screening panels which review and render non-binding decisions on the merits of medical malpractice claims prior to the action being litigated. These panels were conceived as a method of relieving a burden on the courts by the discouraging of the filing of frivilous suits and encouraging settlement of meritorious ones. Nevertheless the use of screening panels remains controversial.

Today, the Comittee will receive testimony on both the positive and negative aspects of medical malpractice screening procedures to aid us in determining whether California should also implement such a system.

Our first witness is Assemblyman Leroy Greene, who is the author of AB 2919.

ASSEMBLYMAN LEROY F. GREENE: Thank you, Mr. Chairman. As you indicated, the purpose of AB 2919 was to create the malpractice screening panels and they would have been empowered to review allegations of medical malpractice...

CHAIRMAN FENTON: Excuse me, I was remiss in not introducing the other member of the Committee who is here, Assemblywoman Jean Moorhead from Sacramento. Go ahead, Leroy.

ASSEMBLYMAN GREENE: In any case, what we sought was to create the malpractice screening panels. They would have been empowered to review allegations of malpractice in an informal setting prior to the filing of a lawsuit. The concept is that such a panel which would be composed of, in this case, it was proposed to be a judge, an attorney and a physician of the same specialty as the person accused of malpractice, that they would be able to decide the issue of negligence in a fair and equitable manner and at much less cost in both time and dollars to both parties involved. Currently, there is no mechanism for an injured party to determine if an injury is the result of malpractice as opposed to unsatisfactory outcome of an illness or injury without going to the expense and the time involved in a civil suit. So, the malpractice screening panel, then, would provide such a determination as to whether in fact malpractice was involved at a much lower cost. It was presumed that the benefits of such panels to physicians would be similar. An expert panel could settle the question of negligence without the significant cost to the defendant of defending a civil suit. Under the bill that you're using as a basis of your

discussion, AB 2919, both the injured party and the physician would retain the right to a jury trial if either party chose to appeal the panel's decision. To keep this screening panel process from being a meaningless exercise, AB 2919 provides that the findings of such a panel shall be admissible at a subsequent trial and shall be treated as expert testimony by the court.

The bill was not successful in passage so then I asked that AB 2919 be sent to interim study because there didn't seem to be a consensus of opinion evolving as the bill was being considered. And I'm hopeful that this hearing will produce the information necessary to produce a consensus and either strengthen such weaknesses as perceived in the bill or else indicate once and for all that this is something that is not the suitable direction to go. I of course think it is such a direction or I would not have put in the bill. With me today is Dr. Marsh Steward, the immediate past president of the California Association of Obstetricians and Gynecologists. Dr. Steward is a strong supporter of the malpractice screening panels, as is the association of physicians he represents. That's my opening statement, Mr. Chairman.

DR. MARSH STEWARD, JR.: As Mr. Greene said, my name is Steward and I'm a practicing obstetrician and gynecologist down in Fullerton, California. I'm the immediate past president of the California Association of Obstetricians and Gynecologists and I'm currently chairman of their malpractice committee. Medical malpractice today still constitutes in our opinion one of the major problems facing the medical profession. It's also in our opinion one of the factors which is causing the cost of medical care or health care to be priced out of the ordinary consumer. OB men are particularly interested in this aspect of medical practice because we're more likely to be sued by ten times than any other practicing physician. We are not interested in trying to reform the entire tort system. We are not interested in changing the basis of American jurisprudence, but we do feel that there are some things that can be done in a small way which will improve the performance of the system. Assemblyman Greene's bill creating pre-filing screening panels is one of the things that we feel can do a great deal.

Pre-trial screening panels or pre-filing screening panels exist today in 29 of our states. They are mandatory in 19 of our states. I think their goals, as Assemblyman Greene said, are relatively straight-forward. They seek to screen out the frivolous or the baseless suit prior to its getting into the system and clogging it up. And they also would likely assist in the speedy resolution of those claims which are well based or well founded. Medical practice today is such a complex technical situation that very few doctors are able to understand all of the aspects of medicine and certainly the non-medical person, the lay individual who is involved in this process is sometimes completely at a loss. The patient who feels that she has been injured takes her complaint to an attorney who examines it for potential action and he really in many cases is unable to reach a decision as to whether there is anything there or not. These pre-trial or pre-filing screening panels would be a mechanism by which he could get at least supposedly objective, unbiased, expert opinions which would examine the facts informally and say to him, "We feel that there is a justified cause of action here". Or conversely, "We feel that this is not a matter of medical negligence." I think this would accomplish,

as I said before, the weeding out of the baseless claims which are numerous.

The Association of Insurance Commissioners, in its study of this problem, has indicated that the physician-defendant is winning nine out of ten of these cases which go to trial. Now either there are an awful lot of inept advocates or there are a lot of baseless suits being brought. And I think that a mechanism which would help to weed out these baseless suits would be of great advantage to both the patient, the attorney and the physicians.

CHAIRMAN FENTON: Doctor, according to this bill the attorney is selected by the judge from a list submitted by the local bar. However, if the attorney selected is a trial lawyer, we know his bent. If the attorney selected is a defense attorney we know his bent. How do we achieve impartiality in these proceedings? I assure you as an attorney it's sometimes impossible to be impartial. The only one that would be impartial, would be the judge. That part of the proposal bothers me.

ASSEMBLYMAN GREENE: Well, Assemblyman Fenton, the screening panel is a preliminary bout to the main bout which would be a trial before the court. And what you are asking of these three people, the judge, the physician, and the attorney, is, "Do you think that there are proper grounds of malpractice?" And let us suppose that there is bias on the part of one or more of those three -- and therefore you have what might in the end prove not to be the case -- you know there's a bias one way or the other. There then is in the bill itself a system whereby if you don't agree within 60 days with the party, you can appeal that as well so that...

CHAIRMAN FENTON: You can appeal it?

ASSEMBLYMAN GREENE: Yes, if the screening panel determines there is no liability, that determination may be reviewed by filing a complaint within 60 days and also the other way around. So that...

CHAIRMAN FENTON: Well, you say the decision may be reviewed by filing a complaint, right? Let's say I have a medical malpractice claim. We hold a hearing on my claim and you find my claim not to be meritorious. Now what you're saying is that within 60 days of that I have to file a normal medical malpractice lawsuit. Correct? That's the complaint to which you're referring.

ASSEMBLYMAN GREENE: Right.

CHAIRMAN FENTON: Now, how is that different from what we have now? From the time I file my complaint, what is different?

DR. SEWARD: There's one thing...

CHAIRMAN FENTON: What does this opinion do other than trigger the 60 days time period?

DR. SEWARD: Well, it is also considered germane in the case itself. That is, it is evidence as expert testimony in the very case that is before the court. So that's one thing.

CHAIRMAN FENTON: Okay, that's where my talk about bias, unintentional bias, bothers me.

ASSEMBLYMAN GREENE: Well, whether it's intentional or unintentional bias, you know you have that at any witness in any trial, okay. Intentional or unintentional bias. That possibly always exists.

CHAIRMAN FENTON: I presume you would not allow the plaintiff's attorney to call in the judge, to call in the doctor and to call in the attorney and cross-examine them on the basis of which they have rendered their opinion.

ASSEMBLYMAN GREENE: I don't know the answer to that question. I don't know.

DR. STEWARD: As I read the bill and as the other pre-trial screening panels are constituted in the other states, it is not an adversary proceeding.

CHAIRMAN FENTON: The opinion is just entered and the jury, if you have a jury, would be given precautionary instructions that this is an opinion and they are to consider this as an expert opinion.

ASSEMBLYMAN GREENE: But I don't know why you couldn't call them in, Jack, because the language of the bill says on page 5, line 4, the judge who is a member of the screening panel shall not preside in the subsequent hearing or trial in the same case. Nothing says he cannot be called as a witness. Likewise, it says on line 7, 8 and 9 on page 5 that no member of that panel shall be liable for damage for any acts or statements made as a member of the panel but again nothing suggests that the person cannot be called into the courtroom.

DR. STEWARD: May I just interject something there. In answer to your question about the inherent bias on the make-up of several members of the panel, I'm sure that there would be some bias built in as there is in any human activity, but I think there would be less bias in the so-called impartial objective group than there would be in the people directly involved in the case. In other words, there would be less bias on the part of the attorney who is sitting on the panel than there would be on the attorney representing the defendant or the attorney representing the plaintiff so that attorney might be a little less biased.

CHAIRMAN FENTON: You're talking about degrees. I'll agree with you on degrees. That's correct.

DR. SEWARD: And the same is true of the physician member of the panel. He is not going to be as biased as the defendant's physician. He is likely to be a little more objective.

ASSEMBLYMAN GREENE: You know, it appears though from the number of the states that use such screening panels in one form or another that there doesn't seem to have been too much concern or problem with the bias that you are suggesting because of the great number of states that use it. What you're starting with is an over-all thing here that actually goes back to insurance and insurance claims, malpractice insurance. What you have is something that is extremely expensive and you recall of course as well as anybody, Assemblyman

Fenton, what happened a few years ago when it hit the fan over the malpractice business of physicians. So that what we're saying is okay, you do have a number of cases that are frivolous suits. How do you weed them out, decrease the cost of malpractice insurance and attempt at the same time to unclog some of the court calendars and the likes? Well, this simply says, "All right, why don't you take your first shot here." And if these people, if they have some bias or not, it seems to me that they still expect to have reasonable people here to that are simply being asked, "Hey, is there some merit to this claim?"

CHAIRMAN FENTON: Well, you have to understnad, Leroy, that without the opportunity to cross-examine, you're now going to allow this in as expert testimony. Normally you are allowed to cross-examine, the people who are giving expert testimony.

ASSEMBLYMAN GREENE: Again, I see nothing in the bill that prevents that. If you could show me anything that prevents that I'd like to see what it is.

CHAIRMAN FENTON: Well, you are permitting the opinion in. If I call a doctor, I have to call him in as my witness. In this bill you allow the opinion to go in period as expert testimony.

ASSEMBLYMAN GREENE: I know but there's nothing to prevent you from calling that attorney or the doctor to ask any question you want as to how he reached that conclusion. The conclusion still stands but I don't think there's anything that prevents you from questioning as to how he arrived at it.

DR. SEWARD: May I say something to that?

CHAIRMAN FENTON: Sure.

DR. SEWARD: In some states, these panels are so constituted that their opinion is not only allowed to be introduced into the trial as expert testimony, but it is also presumed to be correct. Now this is a very small minority of the panels. In most of the cases the findings of the panels are allowed to be introduced into the trial, but theirs is just as open to contesting as any other expert witness.

CHAIRMAN FENTON: Yes, but you contest it by virtue or your witnesses coming in and giving their opinion -- not by questioning the judge, which I'm sure you would not be allowed to do. Ms. Moorhead wants to ask you a question.

ASSEMBLYWOMAN JEAN MOORHEAD: WEll, I'm confused as to a comment that you made, doctor, that if somebody came to a physician and said, "I think we have a basis for a malpractice action," and then that physician needed to turn to somebody with more expertise. I didn't have the feeling that you meant this panel but as we've had this discussion now, I'm confused. Do you see the panel as the -- as a resource or,as I hear the Chairman saying, the first level of litigation? I'm confused.

DR. STEWARD: I think, Ms. Moorhead, that these panels, as I see them at least, are both. I think they can constitute a resource for the injured party. If the panel looks at this problem and says,

"Certainly this is a case of medical negligence" then this finding is given to the plaintiff's counsel and the plaintiff,under the rules of most of these panels, would be able to draw on the experts constituting the panel, or other medical experts furnished by the society to support that contention. So it would allow, for instance, a small injury which today if it's $25,000 or less will never see the light of day because the costs are too much to get it into the system, it would allow a case like that to be settled in favor of the plaintiff with much more ease. So they do constitute a resource.

ASSEMBLYMAN GREENE: Actually, the screening panel says yes or no to a question. And the question is was there malpractice involved?

DR. SEWARD: Whether there was any negligence.

ASSEMBLYMAN GREENE: Yes, whether there was any negligence. And the only thing that screening panel says in the end is yes or no.

CHAIRMAN FENTON: Leroy, it's very important when you're sitting there with a jury, and you bring in some testimony and you say, "Some panel of experts has decreed that there's no negligence here" -- that's a very potent thing...

ASSEMBLYMAN GREENE: I find nothing that prevents you from questioning those people.

CHAIRMAN FENTON: If you're saying that you're going to bring this legislation again and you're going to amend it to say that this opinion will be admitted as any other expert testimony, and the experts will be there to be cross-examined by the other party, that's something else. But you know that's not going to happen because the judge isn't going to be there.

ASSEMBLYMAN GREENE: I see nothing in the bill that prevents it now. If you can show me something about this bill that says you can't cross-examine...

CHAIRMAN FENTON: Leroy, the way trials work is that if I have an expert, I would put him on the stand and then the defense attorney, would have the opportunity,at the time the jury hears his testimony, to cross-examine him. Remember they hear the experts testimony and they hear the cross-examination, and then in their minds they make their own determination. Okay?

ASSEMBLYMAN GREENE: Yes.

CHAIRMAN FENTON: Now what you're doing is you're taking a document or an opinion from three people and you're saying to the jury, "Here is a panel experts made up of a doctor, a lawyer, and a judge, who have determined that there is or isn't any negligence." Now the jury doesn't have the opportunity...

ASSEMBLYMAN GREENE: No, you put the period there. I find nothing in this bill that prevents you from calling on those witnesses.

CHAIRMAN FENTON: Leroy, well calling on them is one thing,

but going through the process of how they make their determination is something entirely different. If we're going to take the three members of the panel and examine them and grant the other side the right to cross-examination, then you're not going to save any time in the process. Now the arbitration process that we've got going, if it works, will save a lot of time. If you're going to allow us to examine the panel in the normal fashion of bringing them into court and then treating them as regular experts then, except for the fact that some cases may not have been filed within sixty days, I can't see how you are going to save any time. I can't see what you've accomplished. I understand the problem with medical malpractice. We're having a problem with attorney malpractice. It's getting to be just as bad as medical malpractice.

ASSEMBLYMAN GREENE: And I can see why.

CHAIRMAN FENTON: I don't quarrel with you. You're quarreling with the wrong person. The medical malpractice problem is caused by a lot of doctors and attorneys. And attorney malpractice is caused by attorneys. There are attorneys involved in medical malpractice and there are doctors involved in medical malpractice, but since doctors don't practice law, they're not involved in attorney malpractice. I agree with you.

ASSEMBLYMAN GREENE: I stated, Assemblyman Fenton, the overwhelming majority of all such malpractice cases are won by physicians. The question then is...

CHAIRMAN FENTON: No, no. You're talking about those which go to trial.

ASSEMBLYMAN GREENE: Correct. Now comes the question, if ninety percent of those that go to trial are won by physicians, then isn't there a question of how many of them are actually still frivolous suits? And can we, by this divice -- by this screening device, decrease the number that are going to appear on that court calendar without regard to how much effort there is in the courtroom.

CHAIRMAN FENTON: I'm not an expert trial lawyer, but I would say expert trial lawyers will not take a frivolous suit that is going to take them a long time. You're assuming that all of your ninety percent are frivolous suits. I won't buy that.

ASSEMBLYMAN GREENE: No, I'm not making any such presumption, Jack.

CHAIRMAN FENTON: I would guess that most of your ninety percent are usually your big cases. I can't say all of them but most of them are cases that there is no way that they could settle beforehand. I imagine, a good number of them are very serious cases where the insurance companies and the doctors say he wasn't negligent and they won't offer enough to settle. The other party believes he is worth the gamble. I don't know, Leroy. What I'm trying to say to you is, from my viewpoint, you've got to find some way to deal with the admission of the opinion as expert testimony. Under existing law, if I call an expert in, I've got to pay him. He becomes my witness now. If the other side calls a witness in and he says things that

are wrong, I can challenge him. If you just let the opinion in you have got to give the other side the right to challenge it by calling all the panel into court. But if you go through the whole procedure what have you accomplished. Ms. Moorhead.

ASSEMBLYWOMAN MOORHEAD: Well, he said that 19 states have this...

CHAIRMAN FENTON: Thirty states.

ASSEMBLYWOMAN MOORHEAD: Well, he said 19.

DR. STEWARD: Twenty-nine had them.

ASSEMBLYWOMAN MOORHEAD: Twenty-nine had them and it's mandatory in 19. Okay, what do they do? Can we benefit from what's happening there?

CHAIRMAN FENTON: Well, first you've got to understand that four of these have been declared unconstitutional. As I understand from the Committee counsel, the reason is that there have been a lot of administrative delays and therefore the court ruled that these procedures were unconstitutional. The procedures were taking away the rights of individuals to due process because of the delays.

ASSEMBLYWOMAN MOORHEAD: Well, in the 19 states, is there any one that has something like what this legislation would establish?

DR. STEWARD: Yes. There are a number -- among the 29 states which have pre-trial screening panels, 19 of them are mandatory and pre-filing. That means before the case has gotten into the mechanism.

CHAIRMAN FENTON: Like you're proposing here?

DR. STEWARD: Yes.

CHAIRMAN FENTON: The other 11 allow screening after filing?

DR. STEWARD: After the action has been filed, and some either before or after. The mechanism among the states varies tremendously and the composition of the panel varies tremendously. In some states there have been seven-member panels. The majority of those were too unwieldy and they found that they were really not doing much of anything. Where they have been most successful, they have been constituted of three individuals, most of the time a doctor, a lawyer, and a judge or a lay person other than a doctor or a lawyer. In those cases, for instance in Wisconsin, they have been credited with eliminating from the system 15 out of 20 cases. Now that doesn't mean that they were deciding in favor of the defendant in 15. But they were resolving 15 of the 20 cases. Which is a three-fifths reduction in load on the court system. And this can't help but be beneficial all the way around.

ASSEMBLYWOMAN MOORHEAD: So this legislation is patterned after what you feel is a success in other states?

DR. STEWARD: Yes.

ASSEMBLYWOMAN MOORHEAD: Thank you.

CHAIRMAN FENTON: What happens now if your panel says there is negligence? What do we do now?

DR. STEWARD: If the panel says there is negligence, then the plaintiff's attorney has the option of saying to the defendant, "Your experts have said that this is malpractice. Do you want to settle?"

CHAIRMAN FENTON: Now as far as the plaintiff is concerned we haven't changed anything other than issued an opinion. You don't automatically say to the plaintiff, "The negligence issue has been resolved. Now when we go to trial, all we're going to try is the amount of damages."

DR. STEWARD: No. The findings of the committee are not binding on either side. They are not findings as to liability. Now in some cases -- in some states they are constituted so that they are empowered to decide liability as well as right or wrong. But in Assemblyman Greene's bill...

CHAIRMAN FENTON: Wait a minute, Doctor, let me interrupt you. You're saying now this panel doesn't decide liability. You said earlier the panel decides where there was negligence. When they decide negligence aren't they deciding liability in effect?

ASSEMBLYMAN GREENE: I think you misspoke. You confused damages with negligence.

DR. STEWARD: Damages is what I meant to say. In some states the panel is...

CHAIRMAN FENTON: Also decides the amount of damages. Okay.

DR. STEWARD: But not in the one that is proposed here. So to answer your question, if the panel says, "Yes,there is liability," the plaintiff's attorney can then go to the defendant and say, "We have a case of obvious malpractice. Do you want to enter into an equitable settlement?" And perhaps they can enter into an equitable settlement.

CHAIRMAN FENTON: Well, if we are trying the cases out of the mainstream of the system of the judicial system, why don't you amend your bill to say if negligence is found that the same panel makes a determination as to the amount of damages? Why not?

DR. STEWARD: There are various objections to this and this particular power of the panel has been attacked in a number of jurisdictions on the basis that it is usurping a judicial prerogative.

CHAIRMAN FENTON: So you're doing the same thing by determining negligence?

DR. STEWARD: No. You're simply being a group expert witness.

CHAIRMAN FENTON: But what I'm saying is, if the medical profession is going to say that it wants a pre-screening panel to

decide if there is negligence, to help the system of jurisprudence, then to be consistent, it would seem to me, you should let the panel issue an opinion as to the amount of damages. That will help settle things. I assure you it will help settle things.

DR. STEWARD: I would be against that, Mr. Fenton, on this basis. I think amounts of compensation are well within any lay person's ability to make a value judgment. Where I think the medical malpractice problem bogs down is that we're expecting lay people to judge the scientific facts of the case. And I think in most cases this is difficult for them. So, I think to give the panel the power to decide damages is a function it doesn't need. I think...

CHAIRMAN FENTON: Let me ask you this. We're in a medical malpractice case now, the plaintiff has to have some medical evidence, and usually it's through a doctor, that the person who provided the medical service was negligent. Am I correct?

DR. STEWARD: No.

CHAIRMAN FENTON: You don't have an expert opinion on both sides, right?

DR. STEWARD: Not at this point in time.

CHAIRMAN FENTON: No, no. Forget that. Let's talk about our present system for the moment.

DR. STEWARD: Well that's what I'm talking about. In our present system all that is necessary is for a patient who feels that he or she has been injured, to take her case to an attorney. At that point he files an action...

CHAIRMAN FENTON: No, no. We're in court now. Listen to me, Doctor. We're in court now. We've gone through everything and we can't settle the case. Now we're trying the case and I'm the plaintiff's attorney. Don't I bring medical experts in to show negligence?

DR. STEWARD: Yes.

CHAIRMAN FENTON: All right. You as a defendant bring in your experts. Now you're saying to me, in answer to my question, "Lay people on the jury can't determine scientific matters." Well, neither can the professionals. Because what you've got not is experts that are saying, "Yes, there was negligence" and experts saying, "No, there wasn't." Somebody now has to make a determination as the what we call question of fact, as to whether there was or wasn't negligence. What makes the lay person in the jury any less able to do that than a professional as long as you have expert opinion on both sides?

ASSEMBLYMAN GREENE: Mr. Fenton, aren't you changing the character of the screening panel?

CHAIRMAN FENTON: No, forget the screening panel. I'm not quarreling with that, Leroy.

ASSEMBLYMAN GREENE: No. On this point. The nature of the

screening panel is that it renders its opinion to the court, you know, whether something went wrong or didn't and then it backs away. It is not interfering with the court's structure and the court system. I'm not telling the court that therefore you are to find the man guilty.

CHAIRMAN FENTON: Leroy, I understand that, but the Doctor said that one of the reasons for this new procedure was that people are not capable of making scientific decisions. And I said in your normal malpractice case, there is no scientific decision that has to be made by a lay person. They have to believe one set of experts or they have to believe another set of experts. You don't have to be a scientist and you don't have to be a medical expert to believe one or the other. That's what I was saying.

ASSEMBLYMAN GREENE: Let's agree that that's true. Let's agree that that's true. And let's put it aside and say that you're right and the Doctor, let's say, was wrong, but here we are again. In that courtroom what have you got? You've got an opinion, an expert opinion, okay? It's brought into the courtroom and left sitting there on the table -- do with it what you will,...

CHAIRMAN FENTON: No. You have to take the context of my discussion with the Doctor. I'm not quarreling with your pre-screening. What I said to the Doctor was that as long as the prescreening panel determines liability, why can't they give an opinion as to damages? And he said, if I remember correctly, "That the lay person could determine the amount of damages but can't determine whether somebody is or isn't negligent." And that's the point of the discussion we're having now.

ASSEMBLYMAN GREENE: It seems to me the issue is whether there is or there isn't some form of negligence on the part of the physician. The purpose of the screening panel is to try to answer that question yes or no. And that's it. Other than that we have no desire to interfere with the current court system.

CHAIRMAN FENTON: No, we're not interfering. The Doctor says what he's trying to do is unclog the courts and keep cases that shouldn't be in court out of the system. That will help the court system as well as help the medical profession. I agree with that.

DR. STEWARD: As well as helping the patient.

CHAIRMAN FENTON: Right. And I say as long as you're going to take this pre-screening opinion and let it in as expert testimony as to liability, then let's let them do it as to damages too. That's all I say. I'm not quarreling with him.

ASSEMBLYMAN GREENE: In a very simple answer, no.

CHAIRMAN FENTON: Of course, I understand. Go ahead Ms. Moorhead. I'm just trying to be logical.

ASSEMBLYWOMAN MOORHEAD: I was just going to make a comment. If you did all of that then you haven't changed a lot.

CHAIRMAN FENTON: Oh yes you have. Let's say this bill

passes and it allows the opinion of the screening panel in as expert testimony as to two things, whether there was liability and the amount of damages. I assure you you'll have settlements and a reduction of cases filed. Because if these three people say, "There's negligence in the amount of $50,000," and the insurance company made a previous determination that they only wanted to settle for $30,000, I assure you that $50,000 will be reconsidered. That's what Leroy's talking about. The opinion is going to be very persuasive in the trial. There's no reason it shouldn't be. If you want the expert opinion as to negligence to be persuasive, why shouldn't you also allow them to determine the amount of damages? And he's right, from his point of view to say, "We don't want it." I understand that. Go ahead, Doctor.

DR. STEWARD: Well, I think that in only a very small minority of the other states which have these panels is the panel empowered to decide damages.

CHAIRMAN FENTON: Well, we always pride California on being a leader. Maybe if that's good, maybe we should take your concept and carry it to its proper conclusion. Go ahead.

ASSEMBLYMAN GREENE: We're about thirteenth in funding education. Don't tell me about leadership.

CHAIRMAN FENTON: No, there's no question as I was saying to the media before, that we have a problem, particularly in Los Angeles County. I think their is still a three to five year wait to bring civil cases to trial. These cases do clog up calendars. We are always looking for ways to improve the situation. I'm sure somebody is going to talk about whether the arbitration system that we passed is going to help or not. I do sympathize. Let me say that in 30 years of practice I've had about three malpractice cases and they were all good ones. In fact that were so good I had to refer them to an attorney who knew what he was doing. I'd always go to a doctor friend of mine and ask him what he thought. As soon as he told me he thought it was bad, I had my own screening panel, I just wouldn't handle it. But that's my own opinion.

DR. STEWARD: Another facet of this problem, at least according to the study done by the National Association of Insurance Commissioners, is that only 16 cents out of every premium dollar is getting to the injured patient.

CHAIRMAN FENTON: You're talking to a man who carried no-fault -- I used to argue that all the time.

DR. STEWARD: The other 84 cents is going someplace else.

CHAIRMAN FENTON: You're talking to the wrong person when you say that. That was my argument a long time ago. Is it 16 cents? I think we used to say it was even less than that when we were pushing no-fault. Leroy was one of my main sponsors.

ASSEMBLYMAN GREENE: Jack, I had malpractice before you did. I had the same bill you're talking about, no-fault. Then you got to be Chairman of the committee.

CHAIRMAN FENTON: Yes, and then we got it out. Go ahead, Doctor.

DR. STEWARD: Well...

CHAIRMAN FENTON: I think you have a problem. I think you have a concept that should be looked into to see if something could be done which would be equitable for both sides. That would do two things. One, it would help the administration of justice and, two, it would help the whole medical malpractice field. What you're saying is right but I don't know how you do it. If you could get rid of the nuisance cases...

DR. SEWARD: Where I think the pre-screening panels would offer their best services would be to eliminate the nuisance cases. Now you made a statement a few minutes ago that the accomplished trial lawyer probably doesn't bring frivolous or baseless cases. Now this is true. The expert...

CHAIRMAN FENTON: He doesn't have time.

DR. STEWARD: The expert in malpractice...

CHAIRMAN FENTON: He's got enough good ones.

DR. STEWARD: Right. He is not going to bring those. But the big problem is the young attorney who gets out of law school. And he doesn't have anything else to do and he files five malpractice cases. We find frequently the cases being filed before the records are even gotten from the hospital or from the doctor's office. Now, certainly, that case has not been screened. And these medical malpractice panels would serve this young attorney well in that respect.

CHAIRMAN FENTON: Thank you very much.

DR. STEWARD: Thank you.

CHAIRMAN FENTON: Thank you, Leroy. Doctor Berggreen.

DR. RAYMOND BERGGREEN: I'm here, Mr. Chairman, really as an individual not taking a particular position, although I have some opinions that I would like to state. I'm a physician licensed to practice in Iowa and California. I'm a member of the California and Nevada bars. I've had some four years experience under the Nevada program and I've handled cases in Arizona and I believe I'm competent to...

CHAIRMAN FENTON: Are you a defense attorney.

DR. BERGGREEN: I did plaintiff's medical malpractice for about 10 years. Now, for the last four years I've been doing primarily defense. In Nevada, I handled both plaintiff and defense cases before the screening panels. I also wrote a paper on alternative methods of handling malpractice cases that somehow never got published for the University of San Francisco. But I believe one of the members of the Senate has a copy of that. I have some opinions generally on screening panels. I have some opinions specifically on AB 2019. I believe, as written, it's a very poor piece of legislation for a number of reasons

that I hope to get into. Mr. Lopez was kind enough to send a letter that had some Committee guidelines on the points that he believed the Committee was interested in. And referring to that in a paragraph by paragraph method, I think under his first paragraph as to whether or not there are problems existing in malpractice, it probably requires candor to acknowledge, and I feel the Committee would agree, that this gets to the Committee because it's a dollar problem for physicians and a dollar problem for carriers. They look at this as some way to resolve those problems. And it does in a number of ways. As a practical matter these screening panels add about a year to the litigation process in Nevada. From the time you file the claim until your panel has heard it and until you file your complaint, about a year has expired.

CHAIRMAN FENTON: Does that waive the statute of limitations when you...

DR. BERGGREEN: The statute of limitations is tolled during that period, in Nevada. But in essence it allows the carriers to hold their money for another year. They've increased their profit by that amount. In addition, in that period of time from the filing to trial, a number of plaintiffs have died, for example. So it's a benefit to the defendants or the carriers. Basically, it is another manifestation of the fact that the medical profession, with some justification, feels that it should judge itself. As you've heard testimony already, they don't feel that lay people are capable of judging the complicated medical issues that appear before juries at trial.

And in the bill as presented here, it's the single M.D. aspect of the bill that I think is most objectionable. You're going to end up with one doctor of questionable bias, of questionable expertise on the subject, who will in effect carry the issue of liability to his non-medical panel members. They will turn to him to say, "Was the operation indicated? Was it technically performed? We don't understand. You're our expert." So you have a single doctor who's going to carry that, and I think that it is eminently unfair.

The only thing really wrong with the existing court procedures, if you look at it from the physician's standpoint, is the size of the verdict. Most of the cases, as you know, are settled out of court. You've heard this testimony that nine out of ten cases that go to verdict are won by the doctors and that's some evidence that there are a lot of frivolous claims filed. Well, six percent of the tort cases that are ever filed ever go to trial. Most of them, as you know, are settled before trial. And those ten cases that ultimately get to trial are those where there is a genuine dispute on the issue of damages. It isn't that they're frivolous because all those cases go to trial with expert testimony so somebody thinks there is some negligence. The fact that the nine out of ten go for the physicians is indication of perhaps a number of things. Perhaps the respect with which the medical profession is held by members of the public. But as a practical matter, if you're trying so few of them the burden of medical malpractice cases per se in trial is not all that great on the system. You're right. Down in L. A. County they have their problems getting to trial. As a matter of fact, in the Central District you can't get a case out to trial unless you're building up to the five year statute. But that is not primarily the result of the number of medical malpractice cases being filed. And I don't think that the

system or that the litigation involved in these cases is the burden on the system itself.

Under paragraph two of Mr. Lopez's request for comments, the issue was whether or not it was economical to install such a program. I think the answer is it's economical only to the extent that it benefits the defendants and their carriers. Obviously it adds a great deal of time and expense to the plaintiff and the other litigants to have to go through this procedure and the time involved is a considerable burden. As I indicated, in Nevada it adds about a year.

The third paragraph had to do with the legal issues. There are two of them. In the first place it can't be binding on the defendant, even though you get the issue of damages decided by the screening panel. It's not binding. The doctor will say that under the Sixth Amendment he's entitled to be tried by a jury of his peers. So that except for the pressure of having had a panel verdict against him there's no compulsion to pay money. And even in Nevada where we have had an occasional verdict by the panel that was favorable to the plaintiff it has been necessary to file the case and go through all the things that you would have done otherwise. Do your discovery. Do your negotiations and ultimately settle it. The idea that you go before the panel and get a verdict and go with your open hand and they will pay you, is nonsense. I think the most important legal issue, and it has been decided in some other states, is as to whether or not it's constitutional. There is an excellent Fourteenth Amendment -- equal protection argument against these things, that the plaintiff who has been injured by a doctor is required to go through these steps, pay these costs and take this additional time when another plaintiff who has been injured by a negligent automobile driver, isn't required to do all that. And that's the basis on which these plans have failed in the other states. And I have serious doubts as to what a California court would do with that argument if it were raised.

The fourth paragraph was what's done in other states. In Nevada it's a six-member panel. They have three doctors and three lawyers. One of the problems with it is no pre-hearing discovery is allowed. So in essence you file a claim based on what the plaintiff says. You get the medical records and you go in and in two or three hours in an evening, attempt to try a case that would take you three weeks in court, because you've done no discovery. The virtue of it was that if the plaintiff succeeded in winning a decision that the county medical society would provide him with an expert witness in case the case went to trial. The findings of the panel would not be admissible. But if you won, they said, "We'll give you a doctor." As a practical matter, if you win your case and go to the county medical society and say, "Look, I won. Give me a doctor to testify," what you hear more often than not is, "Well, we can't find anybody who will come in and testify for you." So in essence, you're back where you were before, to square one. You file your claim. You've waited a year, then you get your result whatever it is. You file your complaint. You do your discovery. You get your own witnesses. You complete your own negotiations. And then you go to trial. You've done nothing except waste the time and what money it has taken in that involvement. You still have to file in court. You still have to do your discovery. You still have to get your expert witnesses.

The panel proceedings, as I said, are inadmissible for any purpose. One of the problems that has arisen is, as I say, we can't do pre-trial discovery. In essence when you take the defendant doctor before the panel and question him to lay out your case, you are in effect taking his deposition. So that if you proceed with the case later, he has had his deposition taken once. He knows the questions you are going to ask him, he's fully prepared. Because the proceedings of the panel aren't admissible, if he changes his testimony, as he frequently does, there is no way you can go back and say, "But doctor, at the screening panel you said thus and so and now you testify in this way," because whatever happened in the panel isn't admissible.

Arizona, as was set forth in the letter from the Judicial Council, is a little better I think. Arizona has a panel that has, I think, three doctors and three lawyers and a judge. They allow full discovery before the matter goes before the panel. So you take your depositions. You do your interrogatory. But when it's all done in essence you do what you do before trial in California. Most of the cases that I've handled in Arizona are settled or otherwise disposed of, without ever going before the screening panel. So that it exists as a threat, for whatever that's worth, and there the findings of the panel are admissible. They are not admissible as expert testimony but the jury may give it whatever weight they choose to. They are informed that it has been heard by a panel of doctors and lawyers and they found thus and so. But to admit it as expert testimony is something else. But as a practical matter the existence of the panel in Arizona has really done nothing to change the time or the course of the litigation. You file your claim. You do your discovery. You engage in negotiations. Most of them are settled or otherwise disposed of. And in my experience it has been a rare one that has had to go before the screening panel. So if you are looking for a way to develop a panel and to use it, I think the criteria and the structure of the Arizona panel and its use is certainly far better than what they use in Nevada and infinitely better than what's been proposed in AB 2919.

I think AB 2919 is bad in general because I don't think it would stand against the equal protection argument. I think it is bad specifically because the plaintiff has to file a claim but there's nothing in it that the defendant has to provide an answer. So you go into your hearing without knowing what position the defendant is going to take on it. In the second place, it excludes hospitals and other health care providers. So if the plaintiff has got a case that involves negligence on the part of a hospital and negligence on the part of a doctor, he's got to bifurcate it and try this one case against the doctor, even though the hospital may be involved, before the screening panel and then, depending on the result, try to combine that in a case in court against the hospital. Now, we are faced with that problem already in California where we have compulsory arbitration against certain individuals. For example, in Southern California all Kaiser cases have to be arbitrated. If you have a case that involves care at Kaiser and then they go to another hosptial and you contend that there is negligence on the part of both of them, and it happens frequently, you have to arbitrate your case against Kaiser, and you have to file your case in court against the other defendants and somehow divide them both and make one case out of it. It's a terribly difficult

thing. I think something in the future will have to be done about that. But if you add to that problem by requiring that doctors have to go before a screening panel and the other people don't, you've added to that sea of problems. My third criticism is the use of a single physician on the panel. As I've said before, he becomes the expert for them. Fourth, that the scope of discovery in this bill isn't set out at all. And fifth, because of the requirement that you have to file within 60 days,it's an attempt, and I think an unwarranted and perhaps unconstitutional attempt, to further limit the stature of limitations as it applies to medical malpractice cases. The attempts have been made and actually been successful to some extent in constricting that in the Keene bill. And each year we face additional limitations on that. And I think to further limit that in this legislation would be unfair and unwarranted. I have nothing further.

CHAIRMAN FENTON: Ms. Moorhead want's to ask a question.

ASSEMBLYWOMAN MOORHEAD: I'm interested in the time frame that you were talking about because, as you mentioned, there is such a length of time in this state before one goes to trial, and I was confused over the year. Did you say that it adds an additional year in Nevada?

MR. BERGGREEN: As a practical matter...

ASSEMBLYWOMAN MOORHEAD: And how does Arizona differ from Nevada?

MR. BERGGREEN: Well, as a practical matter, in Nevada, you file your claim before the screening panel and then the screening panel gives you a date. Because there have been so many cases filed, they just can't find members of the screening panel to hear these things and because six people are involved it takes a long time to find a night, and these are held in the evenings, when the screening panel can act. So there are postponements and continuances. And as a matter of practical -- for all practical purposes, by the time you file until you have your hearing and you get the result of your hearing, a year has passed. Now, in that year you have done nothing. You can't take depositions. You can't engage in discovery. You can't really engage in negotiations. Nothing has happened. So, you've wasted a year. You get the result of your screening panel and then you file your case in court and you proceed as you would otherwise. So you've added a year to that time.

Now in Arizona, you file your case before the screening panel. You are allowed to do your normal discovery and everything proceeds as it would if the case had been filed in court, except that what you are aiming for is ultimately a date before the screening panel rather than a trial date. So having done your normal discovery, having engaged in your normal negotiations based on that, the chances are that this would be one of the nine out of ten cases that will be settled or otherwise disposed of without the necessity of a hearing. So you haven't wasted that time. You can use that time for the normal discovery procedures that you would do in a superior court case in California.

ASSEMBLYWOMAN MOORHEAD: So if you had less panelists and they were able to do more, would you think there was any merit to this proposal?

MR. BERGGREEN: Less panelists may be of some importance. I had a suggestion, really, that I thought it might be wise if you were seriously interested in it and you thought that there was enough of a problem that it would be of acute importance to do something about it, it would be wise to expend some funds to establish a pilot program in one or two of the counties in California where we're having most of our problems in getting these cases to trial. It should only be used in cases where all the defendants are physicians, so you don't have this mixture that would compound it. If you've got a case against a doctor and a hospital that wouldn't apply. I think the panel should probably consist of two lawyers and two doctors, but that each side should have the opportunity to select its own. In Nevada they are selected at random from the list of the medical society. You never know who you're going to get. You can get some real turkeys, maybe somebody that you've sued. Although you have a chance to bump them, you very frequently end up with some pretty hostile panel members. But if the defendant selected a member from the medical profession and the plaintiff selected a member and each side selected a lawyer, I know you would end up with four. Ideally you should have five if you are going to decide it but I have a further point to make. I think you should allow full discovery before the panel proceeds to trial, then and only then would you use the unanimous verdict of the panel to be admissible in evidence. If they divided on it or if they went three-two, maybe there would be sufficient dispute as to the merit and it should be decided by a jury. But if you had a unanimous verdict in a case where full discovery had proceeded and the matter was heard before a panel where a reasonable lack of bias was assured by the use of the panel members that had been selected by each side, I think there is a reasonable chance that the screening panel would work. You still have the delay, you still have the constitutional arguments, but if you're going to put a panel together it should include some of the safeguards I believe that we've discussed.

ASSEMBLYWOMAN MOORHEAD: Thank you.

CHAIRMAN FENTON: Thank you, Doctor. Very enlightening. Jerry Wilson -- not here? Okay, Ed Kerry.

MR. EDGAR KERRY: Good morning. Thank you, Mr. Chairman. Ed Kerry, representing the Judicial Council. Thank you for the opportunity to express our views on this particular proposal. The comments that I'm about to make are not be be construed as indicating opposition to the concept of screening cases in some fashion. I would like to turn specifically to the questions that are raised by the Committee Counsel in the analysis.

CHAIRMAN FENTON: Do you want your letter dated October 10 to be part of the record, Ed?[1]

MR. KERRY: Please. I would certainly appreciate that and I am simply going to highlight that so you can follow along if you like. The question I would like to begin with is question number two here, raised by the Committee, "Would the screening of malpractice claims be a more economical method of handling malpractice cases?" Our feeling

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1 Appendix A

is that it would not be a more economical method for four reasons. The first reason is simply that this bill imposes an entirely new procedure which is over and above the existing judicial process. It is not in lieu of. And this is a fairly expensive procedure but I'll defer the cost comment for a few moments. So we're talking about setting up a non-judicial procedure where requests for panel determinations have to be filed. No question as to whether or not that is a first paper of filing in terms of the court's reaction to it. There are notices that have to be served, the other parties have to be noticed, the other party has the opportunity to respond to that. There have to be lists developed and maintained of both attorneys and doctors. Those people have to be selected. You have pre-hearing discovery, which we think will be very extensive. And you also have, of course, the deliberations by the panel itself. That is a very costly process, and that is over and above the existing process. That's the first concern that we have that leads us to the conclusion that this would be less economical.

The second one here is the issue of discovery. As you may note, this bill imposes a new standard of discovery. It is much more restrictive than discovery rights in existing California law. We think that that is going to result in extensive law and motion practice as to what is permissible to be discovered and what is not. That's going to duplicate existing discovery. This does not substitute for discovery which will be post filing.

The third point we raise here is simply that you have an existing arbitration system in California. It is mandatory for specified types of cases, $15,000 or less. If the plaintiff opts to go to arbitration and agrees that the disposition will not exceed $15,000, he can also take it to arbitration. This duplicates, in essence, the actions of the arbitration panel for those types of cases.

The final point I want to make on this question 2a is that something in the neighborhood of 6 percent of the total PI cases, and that includes these types of cases medical malpractice, go to trial, only 6 percent of the cases. In the other 94 percent of the cases, there is very little judicial activity, court activity judge time involved. This proposal requires in that 94 percent which currently have very little judicial activity, that extensive activity result by involving the clerks office, by involving the judge. We think that that doesn't make a lot of sense and that is indeed a very costly proposition.

The second question here that I would like to respond to was question 2b, and I have broken this down because in your memo you've got about five questions lumped together in the second paragraph, "What costs would be involved in using a pre-trial screening process?" The first cost that we see is the cost of setting up this new system. Now the existing arbitration system, our experience tells us, results in a cost of approximately $25 per case that goes to arbitration. This is the purpose of selecting that panel, of dealing with challanges to the members, of the paperwodk, back and forth. This bill requires some additional input in the sense that you've got the pre-hearing discovery matters and we think a reasonable cost figure here would be $30 per case. Now, in 1979, there were approximately 8,000 cases filed against physicians and surgeons. If you multiply that out by $30 per case in terms of the administrative costs, you are talking

about roughly a quarter of a million dollars, that is the first cost item.

The next cost item relates to the judge in his capacity as an arbitrator, making determinations on these discovery questions. We think it is very likely you are going to have extensive practice, because nobody knows what this new standard is. But in terms of what the bill provides, you are talking about a different standard. Let me read from the bill for just a moment if I may, "It is the intent of the Legislature that hearings should be expeditious and relatively informal and therefore that discovery should be limited to such matters as are probably necessary for the hearing." We envisage it is very likely that you may have a law and motion issue in every single case. If that is true, we are talking about an average cost in dealing with discovery law and motion issues of $15 to $22 per case, under existing calendars. Using the same estimate, we are talking about a claim of between $120,000 and $176,000 dollars per year for that phase of it.

The next is the costly portion, that is the panel's deliberation itself. Our experience in arbitration indicates that it takes one to two hours for the arbitrator to reach a determination as to the issues of liability and of course the arbitrator under the existing system also deals with the question of amount. This proposal of course deals with three people, a much more cumbersome type of arrangement and more time consuming. If it takes one hour for this panel to reach a determination, our computation is that this means $816,000 in costs. If it is two hours, you've got double or $1.6 million. And I would point out that the bill is somewhat ambiguous. It notes that the decision shall be limited to the existence or absence of liability, yet further down in the bill it talks about if a complaint is filed subsequent to the panel determination, the findings of the panel shall be admissible at trial. If this panel is required to come up with findings, presumably findings of fact, that is a much more extensive requirement and we think the costs would also be commensurately higher. We are probably talking about two and one half to three hours per panel under those circumstances and that raises this portion of the cost to $2 million.

Finally, we are talking about one last factor and that is that the bill provides that a judge participating in a panel cannot preside at any subsequent hearing or trial on the same case, so there are going to be assignment costs. Now, even taking into consideration that only six percent of the cases actually go to trial, we are talking about judges having to be assigned in a fair number of cases from another court. The average cost of assigning a judge to another court is $220 per day. If we assume that every thirty eighth case, which is half of those which actually go to trial, will result in an assignment, we are talking about another $210,000 or $212,000. So the total cost summary we are talking about, Mr. Chairman, of the bill, is somewhere between $1.2 and $2.5 million dollars from a cost factor.

The next question raised is under 2c, which is, "Would a screening process result in a more expeditious handling of malpractice cases?" And basically for the reasons that I already outlined, the answer is no because you are not replacing an existing system, you are imposing new requirements on top of that.

The next question is, "What additional burden is placed on

the courts by pre-trial screening?" And I would like to combine that with the question number three on legal issues. We feel there are substantial additional burdens that are placed upon the courts under this proposed system. The first I would call to your attention is this, this bill says that a clerk cannot file a case, if it falls into a number of different categories. Clerks perform ministerial functions. They do not perform discretionary functions. This bill would appear to require the clerk to begin reading every single action that is filed to make a decision as to whether it falls into these categories. And if it falls into each of these specified groups, it cannot be filed. Query, does that raise the liability question? What if the clerk is wrong? Basically, the clerk does not have the training or skills to make this kind of a legal discretionary judgment.

The next question here which we think is very, very significant, is a constitutional issue but it is not the one that you have already heard about. This is the notion that this bill requires the establishment of an entirely new nonjudicial system and yet look who is responsible for carrying out all of the actions under this system; it is the judicial branch of government. We think that that is simply unconstitutional as it requires the judicial branch of government to be involved in nonjudicial activities. It requires a lot of judge time, and a lot of clerk time.

Another issue we think ought to be raised here is that this type of a request is filed with the clerk. Immediately not withstanding the condition of the calendar, you may have cases backlogged for two, three, or five years. The judge has to immediately extricate himself and become involved in a nonjudicial process, leaving all of these other cases behind in order to move toward an advisory opinion that this panel is going to give. That is a significant issue. This category of potential litigants is given a tremendous advantage in terms of receiving an advisory opinion, everything else simply is required to stay still. Query, what will the impact of that be on existing court calendars?

The converse argument that has been made is of course the equal protection argument in terms of requiring this category of litigants to go through these additional processes. Three additional points only, and some of them are a little bit technical. I would point out first of all that in conjunction with the existing one year statute of limitation, this poses a very substantial burden on the claimant, because the statute is not tolled while all of this is going on. If you begin to back up and ask, how much time does it take to get the request in, to have the service of process, to have the response in, and then just set up the panel, to go through all of the pre-hearing discovery, you are liable to conclude that the claimant has to file this request within a matter of weeks of the time of the initial alleged injury. We think that is a serious problem that ought to be dealt with. A second point here is the discovery issue. You are liable to have multiple defendants, I don't see from a judicial point of view how you can possibly complete all of the discovery. You may have two or three doctors, an anesthesiologist, an ambulance driver, and a hospital. The time frame poses serious considerations. Finally, here I raise the question, how realistic is it to expect doctors and lawyers to provide pro bono service, quite aside from the bias issue. And I think that is a very substantial issue that you have raised

earlier, Mr. Chairman, but the current arbitration system provides that attorneys who participate will be paid up to $150 per case. Is that per day? I am not sure. Counsel may know that. It is either per case or per day, this provides for no payment whatsoever.

The last point I would like to make is with regard to question number four. The experience in other states, I would point out there are some very significant differences in the Arizona statute which avoids many of the problems that the statute has. It would only add that the National Center for State Courts at the request of the Arizona Medical Association is currently evaluating the effectiveness of the Arizona statute, which has been in operation for four years. That report should be finalized by the end of December of this year. Thank you, Mr, Chairman. If I can answer any questions I would be glad to.

CHAIRMAN FENTON: Just one. Are there any redeeming features in this bill that you can find, Ed?

MR. KERRY: It is not a strong bill, Mr. Chairman.

CHAIRMAN FENTON: Thank you, Ed. Jim Mart. Mr. Lopez informs me the Rand Corporation is also doing a study on it.

MR. JIM MART: Mr. Chairman, my name is Jim Mart, I am a practicing attorney here in Sacramento. My experience is about 15 years in the personal injury field with the last eight years very heavy in the medical malpractice area. In fact, probably before the 1975 legislation I spent almost 100 percent of my time in the malpractice area. Since that time through discretion that was presented by that legislation and probably less than half my time, and I am still very active in the medical malpractice area.

I am going to limit my comments, you have heard almost all the arguments that I have to make already. Perhaps I can cover a couple of areas that have not been mentioned as opposed to trying to repeat what has already been said. The strongest thing that I would suggest to this Committee is that the screening panel is just not needed. Right now, we have adequate procedures, some of which we have not given adequate time to see their full effect, particularly the Certificate of Merit. As a practicing attorney, I am very happy you passed a Certificate of Merit bill. Now I am sure you have heard members from the CTLA up here opposing it who eventually wised up and suggested modifications that made it a workable bill. Many attorneys in the medical malpractice area, and outside the medical malpractice area, have said what the Certificate of Merit does is it makes us do our work at the start of the case as opposed to somewhere down the line and that is going to be exceedingly helpful in eliminating a lot of cases that should not be filed. As a practical matter, we don't want to spend our time and their money, both of which are quite extensive on medical malpractice cases in a futile effort to try to recover. It is ridiculous. A medical malpractice case that goes to trial costs a lawyer a minimum of $10,000 -- hard dollars, out of his pocket. And that is in a relatively simple clear cut case. $20,000 is not unusual in terms of the lawyer's money.

CHAIRMAN FENTON: Are you talking about time away from your office?

MR. MART: No, I am talking about hard cost, jury fees, witness fees, expert fees, in any type of malpractice case.

CHAIRMAN FENTON: That you have to pay and can lose if you don't win.

MR. MART: Right. For example, I have not tried a medical malpractice case since December of 1978. Fortunately I won that case. I had $25,000 in costs. Every other case has settled. And I have settled them quite regularly and you make a heck of a lot more money settling than going into court and that is the nuts and bolts of it. There are a small number that do go on to trial. I think the system should air those cases. They are not the frivolous lawsuit. If they were frivolous, the summary judgment procedure would eliminate them.

Another great threat to the lawyer is the malicious prosecution cases. And there is getting to be a great frequency of those in the courts. In fact, I am sure it will be the subject of some sort of legislation in the near future because of the problems it is creating on the judicial system. As it stands now, the frivolous case is weeded out. It is the case that goes to trial, and it is true that nine out of ten are lost, it is because you have expert testimony on both sides of the issue and the natural tendency of jurors is more toward the defense than the plaintiff. When I talk to a client about settling a case, I spend about an hour of my time just talking about the problems of winning in clear cut cases, where I have strong witnesses from university centers who still will not necessarily carry the day in front of a jury on a very strong case. The risks are just against the malpractice litigant. They are foolish to go to trial. But I think that the system can affort it.

If we look at the statistics, the number of cases that went to trial that resulted in verdicts of more than $30,000 was 13 cases in 1979. That figure is from the statistics from the Board of Medical Quality, that have to be recorded. About nine out of ten cases are lost, so if we do a little mathematics we are talking about approximately 150 cases throughout the whole state that are actually being tried, that are taking up judicial time. My own practical experience is I settle more than 20 cases as compared to every time I go to trial in a medical malpractice case. I would almost say a lot more in the way of statistics.

CHAIRMAN FENTON: Jim, I don't quarrel with you. I understand what you are saying. But there are also quite a few cases that consume a lot of judicial time by virtue of going through various stages, then settle late. You are talking about those that actually go to trial.

MR. MART: I agree, but as the Judicial Council witness indicated, the court time in the cases that don't go to trial is fairly minimal. Usually the first time the court gets involved, except on some discovery motions, -- really the competent practitioners don't fight great battles on discovery because they are costly. You can make a frivolous motion, but you are just wasting your time and a lot of money. There is that practical side of it.

It just seems to me that we are imposing, by a screening

panel, a very costly procedure and I agree with the statements about the cost of the courts, but the cost to the doctors and the litigants is just immense. And I say just to the doctors, not the insurance company. A very impressive witness in my mind was Dr. Berggreen. He is now doing principally defense work. These screening panels would be just a joy to the defense bar. In those states where they have screening panels, and my only personal experience has been with Nevada, but I have had feedback from other attorneys as to how they work and particularly we get a lot of feedback about the Nevada system, there is no such thing as settlement in a medical malpractice case until you have completed this screening panel procedure. The doctor may as well take a shot there and see what happens. It is not binding on him. If it comes out nonliability or not meritorious, whatever the standard they are using, the cases generally would disappear. Then they go ahead and they fight the liability cases. I mentioned on the way over here to Jim Frayne that one experience that I had in a case that I was associated with where the panel in Nevada found that it was a meritorious case, they sent him over to their medical society to get a witness as Dr. Berggreen indicated, and the witness refused to support the panel. He came in eventually as a witness for the defense, and there was a defense verdict in the case. Ralph Drayton came in behind him, and during Dr. Berggreen's testimony he started repeating a similar story that he had heard. And that is what happens. It gives a free shot to the defense that is a very costly one.

Perhaps constructively maybe I can make a suggestion, and this is off the top of my head, it is something that I have always believed in that I think is not being used adequately by the court system, and certainly by the litigants and the insurance companies, it is a better use of the settlement conference procedure that we have and at a more meaningful time. As it stands now, we don't have a mandatory settlement conference, but most courts sort of impose a sort of mandatory conference whereby at least you are dragged in a room with the judge and somebody starts talking back and forth and they are by and large effective in the average case. Almost all these occur about a month to two weeks and in some counties maybe a week before trial. It is at a stage where a considerable amount of litigation costs have already been expended. In the medical malpractice case, many times the ability to settle the cases at figures that make sense to everybody, kind of evaporates away because of the delay. A week before a medical malpractice case, I can't afford to settle the case, I have gone out and spent -- it's not that I can't afford it but my price settlement has to take into account the cost to my client in part. So, one of the suggestions would be to incorporate into this settlement conference procedure, in the medical malpractice cases, a settlement judge who gets involved in that case, maybe at a six month interval, who then follows up with the settlement conference before trial that isn't settled and use that procedure as a method of getting the people together at the early stages. The problem of settlement from the insurance companies' point of view in the early stage is that they are not educated about their own case. I am scheduled to go to trial at the end of this month in a case in which they just absolutely said there was no liability, yet they cannot -- it is all based on x-rays. Right now the defense attorneys are conceding to me that they don't have a ghost of a chance. I have two of the foremost experts out of Stanford. They can't even disclose a radiologist that can interpret the films differently than ours, yet the 90 day letter did not help.

I know the doctor in that case, a very reputable fine doctor, who I know through feedback from other doctors wants that case settled. That case should have been settled long ago, but we have to go through all the steps of these procedures. So a stronger settlement procedure would be the place that I would aim it. If you want to rid yourself of those 6 percent of the cases and get those cases settled, get them settled in the early stages when people can be practical with good strong settlement judges.

CHAIRMAN FENTON: Doesn't L. A. have an earlier settlement conference?

MR. MART: I am not familiar with L. A., but by early you are probably talking three years as opposed to five. You see, in Sacramento we do get to trial occasionally in a year or a year and a half.

CHAIRMAN FENTON: Doesn't it take quite a while for all of your discovery proceedings to go through. In a lot of cases you need them don't you?

MR. MART: Yes, that is why I am suggesting like six months. Normally here is what we do. We file a lawsuit. In a relatively short period of time we take the defendant doctor's deposition; they take our parties deposition -- at that point the case by and large evolves into an expert fight. And at that point in most cases I will go see doctors I know locally who will not testify and will tell me about the case. And I know the merits of the case. Maybe I have my medical research done. I am prepared to talk settlement in that case. At that point I don't need to have my testifying expert. And the same is true with the defense. They get their consultations, not their final ones in the early stages. Everybody...

CHAIRMAN FENTON: Why don't they want to talk about settlement when they have all those dollars, potential dollars, in costs that they may have to pay in the end?

MR. MART: I think the main thing is that -- and this is why settlement conferences are valuable -- that it is a problem inherent in the advesary system for the guy to say, "Let's talk settlement." They really do get stuck up on the etiquette of it. And many times it is the laziness of the legal profession. I don't mind being critical of our profession. I have times where I will walk out of a plaintiff deposition, and I know this happens on my side of the fence and by me perhaps too many times -- my experience being with defense attorneys -- and I say to them, "Look, you've seen everything here. You know what I am going to be able to produce. Now let's sit down and discuss this case." He'll say, "Well I haven't had an expert review it." "Well get an expert to review it and then let's get together. Why wait till the settlement conference?" But the case tails away because nobody bothers to do anything. If you have to go to a settlement conference, the conscientious attorney, and there are a few you know, will try, maybe they don't go up to the level that they should, but maybe we are all being idealists when we expect those things. The settlement conferences,particularly in the early stages, do force the attorney, just like the Certificate of Merit, to do his homework, to do his job. Most of us are fairly busy people. And you know we

put off things. I am sure in your profession as a legislator there are times where you know the priorities as to what has to be done is what you do. So, I really think the settlement conference procedure that becomes more effective may be really the solution. I would take that step before I would set up a bureaucracy of a whole new screening panel. And I do have to say that we are being exceedingly naive if we feel we are going to have them serve without compensation. I serve as an arbitrator under the compulsory arbitration and apparently I was the second in being chosen by the various attorneys this last year, one defense attorney had a couple more than I, and I get paid but I lose money even though I am getting paid. I don't mind. There are some of us that will serve. Who is going to serve? On the plaintiffs side you are going to have the officers of the CTLA. A very biased bunch. You are not going to get impartiality there. Who are you going to get out of the medical profession to serve without pay? You are going to get only the ardent hater of the medical malpractice and lawyers that are going to be willing to dedicate their time. So you are going to have to put up money. And it is going to be expensive. And it is not going to be two and three hours, these hearings.

CHAIRMAN FENTON: What we should do is mandate an expert expeditor in all the courts, one of the judges and give him a club.

MR. MART: Well, you really want to know the ultimate answer? But I am not sure the Legislature or I as a taxpayer are willing to do it. We need to set up an effective statewide peer review. Take it away from the local hospitals and the local medical staffs, and have objective people doing peer review. And as an auxilliary of their peer review they also can make recommendations concerning medical malpractice. You build in a whole new bureaucracy and I am not too sure that's...

CHAIRMAN FENTON: You can do the same thing with the legal profession, we have malpractice...

MR. MART: No question. In fact one of the things, one comment that I have written down here to emphasize this is let's assume I have a serious case, where there is a death, or there is a disability, a person isn't going to work the rest of their life, I guarantee you I am not going to spend two or three hours in front of some panel to present that case with the risk that it is going to a jury with no liability. I am going to bring out all my guns. And it is unfair that I have to expose all my guns at that stage of the case, but I know about legal malpractice because my insurance rates are going up and I don't want my client going down the street a month later when she has a no liability finding and saying to me, "Well, why didn't you bring in Doctor so-and-so from Stanford or whatever." Ultimately maybe we will have to do something more dramatic, but the Legislature has been very, very effective in the legislation that they have passed. Some of it I don't like but it has been effective and fortunately in some parts the courts have helped this in terms that some of the zeal that went beyond our constitutional framework, we always have that background, but it has been helpful. So let's give it more time.

CHAIRMAN FENTON: Thank you very much. Bob Uyeyama.

MR. BOB UYEYAMA: Mr. Chairman, my name is Bob Uyeyama and I am acting County Clerk of Sacramento County and I am representing

the County Clerk's Association.

CHAIRMAN FENTON: You are very unhappy with this because it is going to give you more work, right. I don't mean to suggest this is not important because it's often when changes are made they forget that they are mandating additional administrative work for people involved in handling the cases.

MR. UYEYAMA: Well, the County Clerks Association would like to go on record opposing this bill, simply because it creates additional work on the part of the county clerks throughout the state. And I would like to incorporate into my testimony the letter dated September 10, 1980, by J. S. Simpson.[2]

This bill requires a clerk of the superior court to accept and file all requests for hearing claims filed by plaintiffs for seeking damages as a result of medical malpractice. The clerks are required to number each document, file endorsed copies and put them in the file. And this would create additional work on the part of the county clerk. It also requires that the county clerk mail a copy of the request to the physician and surgeon by registered mail, return receipt requested. This again would be costly and the county clerk would have to bear this cost. The county clerk must also notify the complainant in the event that no receipt is returned, another additional work on the part of the county clerk. This bill provides that the physician and surgeon may file a response why he or she is not liable to the complainant. Again, this requires additional work on the part of the clerk. This bill provides that the hearing shall be scheduled as soon as possible after the screening panel is formed; however, the bill does not specify who shall schedule the hearing nor does it specify whether a notice shall be given. It is presumed that the county clerk will perform these tasks. And this bill provides that any relevant evidence shall be admitted. And again, it is presumed that the medical records will be introduced into evidence at these screening panels and there's no provisions for disposition of that documentary evidence. This bill requires the screening panel to render a decision within 10 days of the end of the hearing. Although not specified by the bill, it is assumed that the clerk shall mail the decision to the parties, another additional task by the clerk. And lastly, this bill provides that a complaint may be filed within 60 days of the date the decision is rendered, whether the panel determines that there is liability or whether there is no liability. And before the clerk can accept the complaint filing, the clerk must determine whether or not it is timely. This would again require the clerk to determine when the decision was rendered. More additional work on the part of the clerk.

CHAIRMAN FENTON: This bill would keep you hopping.

MR. UYEYAMA: That's correct, Mr. Fenton.

CHAIRMAN FENTON: Yes, some of the other witnesses brought up the point. You would be given some discretionary duties. Making those determinations could get you in a mess of trouble too, I imagine.

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2 Appendix B

MR. UYEYAMA: That's correct.

CHAIRMAN FENTON: Thank you very much, Bob.

MR. UYEYAMA: Thank you.

CHAIRMAN FENTON: Mr. Simoni. Our last witness.

MR. RALPH SIMONI: Mr. Chairman and members. I am Ralph Simoni, representing the State Bar Committee on the Administration of Justice. I would like to preface my comments by stating that this is the position of the State Bar Committee on the Administration of Justice, and not that of the Board of Governors. They have not reviewed this measure or the concept of medical malpractice screening panels. If the bill is introduced, they certainly will.

CAJ generally considers medical malpractice screening panels as adverse to the interest of the litigants, both the plaintiff and defendant, with no corresponding benefit to either party or to the court system. Rather than limit or impede litigation, it is quite possible that medical malpractice screening panels would actually increase litigation on such issues as the extent of discovery, et cetera. In essence, what they would do is superimpose upon the regular litigation process these additional procedures which both parties would be required to go through.

I think the crux of the issue has basically been brought forward by some of the preceeding witnesses in opposition to this measure. That is basically the discovery process. I think that's probably the most important. This bill would provide for a very limited form of discovery. It should be noted that discovery is essential to the development of the case of the parties. Assemblyman Greene testified that only 6 percent of the medical malpractice cases that are filed actually go to trial. There are many reasons for this but I would propose that the most important reason would be that the discovery has eliminated many of the cases that did not have the sufficient facts in order to take it to trial and counsel has either settled or dropped the particular case.

There are a couple of points that have not been brought up. With respect to the requirement that the person who is medically injured file a request that a screening panel hear a claim for damages, I assume that it is erroneous draftsmanship and probably was meant to be a claim for liabilities, since that is what we were discussing here. I think there are going to be many issues raised with respect to what the request would consist of. These would be issues that would be brought before a law and motion calendar similar to an issue with respect to the sufficiency of pleadings. It is important to note that merely upon a request, the court would be required to establish and set up a medical malpractice screening panel. There is no ability to preclude this or short circuit that particular setting up of the panel. It could lead to situations where vexatious lawsuits were filed or vexatious requests were filed and you would not have the ability such as a demurrer or other procedural mechanisms to actually preclude the establishing of the panel.

The chairman has discussed the problems with respect to the

impartiality and the composition of the panel. We would agree with him wholeheartedly. I think the most crucial concern in addition to discovery, is with respect to the evidentiary standard which sets up the standard providing for any sort of relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs. This standard totally lacks any judicial consistency. It would obviously lead to a considerable amount of litigation. It should be important to note that this evidentiary standard, as elusive as it is, would govern the admissibility of any decision of the screening panel at a trial on the merits of the case. In essence, what we would be doing, we would be elevating this screening panel composed of a judge, an attorney, a physician or a surgeon to the status of an expert witness without any ability to qualify or determine whether they are. I believe the Chairman adequately stated that this would in essence permit the two competing professions, that is the legal profession and the medical profession, to confron themselves on a different level with the hopes that one of them would prevail with the decision of the screening panel which could then be introduced as expert testimony in the trial itself.

Another issue of primary concern would be the practical concern of counsel concerning the relative statute of limitations with respect to causes of action against health care providers. This bill basically requires that upon the rendering of a decision by the medical malpractice screening panel, the party would have 60 days in which to file a complaint. I would just point out that the Code of Civil Procedure Section 340.5 provides for a three years statute of limitations for the filing of a complaint. And I am not sure how a court or counsel could reconcile the 60 day period provided for in AB 2919 with the present three year statute of limitations for causes of actions. I believe the prior witnesses have discussed the issues concerning the unconstitutionality, which this Committee should also consider very seriously. I have no further comments, Mr. Chairman.

CHAIRMAN FENTON: Thank you very much, Ralph. Thank you all very much. It has been quite interesting to hear about all these points. The hearing is now adjourned.

# # # # # #

CHIEF JUSTICE
ROSE ELIZABETH BIRD
CHAIRPERSON

APPENDIX A

JUDICIAL COUNCIL OF CALIFORNIA

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RALPH J. GAMPELL
DIRECTOR
RICHARD A. FRANK
DEPUTY DIRECTOR

October 10, 1980

Hon. Jack Fenton, Chairman
Assembly Judiciary Committee
4112 State Capitol
Sacramento, CA 95814

Dear Assemblyman Fenton:

The following comments are made in response to a number of specific questions about AB 2919 raised by your Principal Consultant, Mr. Rubin Lopez, in his letter of September 26, 1980.

Ques. #1. This question can best be answered by the California Trial Lawyers.

Ques. #2A. The proposed screening of malpractice claims would not be a more economical method of handling malpractice cases for a variety of reasons:

1. Expensive New Nonjudicial System Required.

This measure requires the establishment of an entirely new, nonjudicial procedure, in addition to, not in lieu of, the existing judicial process. More specifically, a separate, non-judicial, administrative system is required. Documents are to be filed, copied, and noticed. Responses are to be filed. Attorney and doctor eligibility lists are to be developed and maintained for the selection of panels. Prehearing discovery motions are to be calendared and argued. Sessions of screening panels are to be calendared, hearings to be held and findings made in each case. All of this is nonjudicial in nature. Yet, judicial staff, including judges, are required to assume these responsibilities.

2. Duplicates Discovery

Discovery rights, under California law, are quite extensive. This proposal limits the discovery in medical malpractice cases to such matters "as are probably

necessary for the hearing." Personal injury cases, and medical malpractice cases in particular, depend upon extensive discovery. The establishment of a separate, more limited, and vague standard for discovery rights under this nonjudicial screening system, will be highly controversial and almost certainly will lead to extensive prehearing law and motion discovery practices to define the new perimeters for discovery. Because this standard is more restrictive, this discovery will not eliminate the need for extensive discovery subsequent to the filing of any action. It will duplicate existing discovery and will impose substantial additional administrative costs.

3. Duplicates Arbitration

In cases involving less than $15,000, whether under mandatory arbitration or election by plaintiff, the required hearings will duplicate existing arbitration hearings except that a panel of three, instead of one, will be involved and, because of limited discovery, the panel will have less information on which to base a determination of liability than is true under existing arbitration.

4. Needlessly Forces Expenditure of Judicial Resources.

Generally speaking, approximately 6% of personal injury cases ever go to trial. While there is some court time involved through law and motion calendars, on discovery, for example, by and large, 94% of these cases settle with virtually no judicial time expended on them. By contrast, this proposal requires the expenditure of extensive judicial time, through a nonjudicial process, in each and every case. This is an expensive proposition.

Ques. #2B. Extensive costs would be incurred in using the proposed prescreening process.

1. The clerical tasks outlined in 2A. above are similar in many respects to the administrative duties associated with existing arbitration. An average of $25 per case is the estimated cost of administering an arbitration proceeding. AB 2919 involves some additional filing and notice requirements not required in arbitration proceedings plus start-up costs. Accordingly, $30 per case would seem to be a reasonable cost estimate. To process an estimated 8000 claims per year against

physicians*/ at $30 each would cost $240,000 per year.

2. A judge, in his capacity as an arbitrator, is to hear all prehearing matters relative to discovery. The average time for each law and motion item related to discovery, in personal injury cases, is estimated at 9 to 13 minutes. With a judge and clerk present at the discovery hearing, the average cost is estimated to be $15 to $22 per case. Annual costs for this item, based on an estimated 8000 claims per year, would total $120,000 to $176,000 per year. This cost could be substantially understated because of the limited and vague standard for discovery under this proposal.

3. A judge acts as an arbitrator during the hearing by the three member panel. The decision by the panel is limited to determining the existence or absence of liability. In addition, the proposal provides that "the findings of the panel" are to be admissible at trial and are to be treated as expert testimony. It is estimated, based on arbitration experience, that a three member panel will require from one to two hours per case to reach a decision on the existence or absence of liability. If "findings" are required, 2 1/2 hours would seem a more reasonable figure. The costs of a judge and clerk, with necessary operating supplies and a hearing room would total $104 per hour, per hearing. With an estimated 8000 hearings per year the total cost would be from $816,000 to $1,632,000. If "findings" were required the cost would be $2,040,000 per annum.

4. A judge participating in a panel cannot preside at any subsequent hearings or trial of the same case. This may result in assignment problems for some courts. The cost of assigning a superior court judge to another county is estimated to be $220 per day, including per diem and travel. If 6% of malpractice cases go to trial and the average trial is two days, then the annual cost would be $211,200 (6% x 8000 x 2 days x $220). If only one half of these cases required an assigned judge (in other words, every 38th medical malpractice case), the annual cost would be $105,600.

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*/ This California Department of Insurance figure, based on 1979 statistics, is believed to be a conservative estimate of annual claims.

Cost Summary

Administrative Costs	$ 240,000 -	$ 240,000
Discovery-prehearing	120,000 -	176,000
Hearing panel	816,000 -	2,040,000
Assignments	105,600 -	105,600
Estimated Annual Costs	$1,281,600 -	$2,561,600

Ques. #2C. The proposed screening process would not appear to result in a more expeditious handling of malpractice cases. To the degree that a panel determination on liability dissuades a potential plaintiff from filing an action at all, there could be fewer cases actually filed but there is no bar to the filing of an action whatever the determination by the panel may be. The basic reason that the proposed screening process would not expedite the handling of malpractice cases is specified in 2A. above. The proposed nonjudicial system duplicates, it does not replace, much of the existing judicial system. Accordingly, all of the normal processes and procedures still have to be followed.

Ques. #2D. and 3.

Substantial additional burdens are placed on the courts under the proposed pretrial screening system and several of these burdens raise significant constitutional issues.

1. Initially, this proposal requires the clerk of the court to determine whether a pleading is a claim for damages, whether it is against a physician and surgeon, and whether it is based on a medical injury. If it meets these conditions, it can not be filed unless the claim has been heard and decided by the screening panel. This determination by the clerk requires the exercise of discretion and is not a proper function for a clerk. To make such a determination, a pleading would have to be read, or scanned, and legal conclusions drawn as to whether these specific conditions were met. This type of duty requires training not possessed by clerks, clearly exceeds a ministerial role, and could raise

issues concerning legal liability if an erroneous determination were made.

2. The imposition of nonjudicial duties on judges and other judicial personnel is unconstitutional as a violation of the separation of powers doctrine. Article III, Section 3, California Constitution. All of the additional duties imposed on the clerk and on judges by this bill, are prefiling duties. As no action has yet been filed to invoke the jurisdiction of the court, arguably, all of these duties - establishment/administration of a nonjudicial prefiling system, prehearing discovery, and panel hearings - are unconstitutional as they require the judicial branch of government to engage in nonjudicial duties.

3. This proposal gives unfair advantage to medical malpractice cases. Immediately upon the filing of a request for a screening panel, the clerk and a judge are required to perform a series of specified actions ending with a determination by a three member panel as to whether or not liability exists. Thus, without regard to hundreds, perhaps, thousands of other backlogged cases, the court is required to undertake this substantial nonjudicial activity at the expense of its existing caseload. Whether this type of preferential treatment rises to the level of a constitutional deprivation is a matter for conjecture. It certainly seems to bestow a grossly unfair benefit on a select category of cases by giving them, in essence, the benefit of a prefiling advisory opinion.

4. Conversely, an argument can be made that the imposition of these additional procedural barriers to the filing of one class of case only denies claimants with such causes of action equal protection under the law.

Ques. #3. Three additional points appear to fall within the scope of question #3. First, this proposal, in conjunction with the existing one year statute of limitations for personal injury and wrongful death cases (CCP § 340) places substantial time pressures on a claimant. This proposal prohibits filing a medical malpractice action without having obtained a panel decision on liability. The proposal does not toll the statute while awaiting the panel's decision. To get the requisite decision by the

panel and still meet the one year statute of limitations, a claimant would have to file the request for a screening panel almost immediately after occurrence of the alleged injury or death. That seems an unreasonable burden to place on a claimant. Secondly, discovery is a time consuming process even when diligently pursued. The time required to complete even the limited discovery authorized by this bill could take 3 to 6 months. Within the context of a one year statute of limitations, this proposal seems unworkable. Finally, how realistic is it to believe that doctors and lawyers are going to sit, pro bono, on these review panels? Under the existing mandatory arbitration system, attorney-arbitrators are paid up to $150 per day. This part of the proposal may be totally unworkable.

Ques. #4. The National Center for State Courts, Western Regional Office, is currently evaluating the effectiveness of the Arizona statutes which provide for a system of pretrial review of medical malpractice cases. This evaluation, undertaken at the request of the Arizona Medical Association, should be completed by the end of December 1980. It is worth noting however, that the Arizona statute, which was passed in 1976, differs substantially from the proposal embodied in AB 2919. Among other differences, the Arizona statute:

1. Provides for a <u>postfiling</u> review of medical malpractice actions;

2. Provides state reimbursed compensation for the attorney and doctor members of the review panel;

3. Operates within a judicial structure that does <u>not</u> have mandatory arbitration;

4. Preserves the <u>same</u> discovery rights as otherwise exist under

Arizona law; and

5. Does not confer "expert testimony" status on the findings of the panel. A panels' conclusion is to be accorded such weight as the jury chooses to give it.

I hope that these comments have been of some assistance to you in considering AB 2919. I will be available during your scheduled hearing for any questions the committee may have.

Sincerely,

Ralph J. Gampell
Director

by
Edgar A. Kerry
Special Assistant
to the Director

EAK:mmf

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J. A. SIMPSON
COUNTY CLERK AND RECORDER
COUNTY OF SACRAMENTO

September 10, 1980

Hon. Jack Fenton, Chairman
Assembly Judiciary Committee
State Capitol
Sacramento, Ca., 95814

Dear Assemblyman Fenton,

The County Clerks' Association cannot support the concept of malpractive screening panels, a subject to be heard on October 13, 1980, by your committee. We will provide a representative to speak to the issues. In the meantime we provide our reasons for non-support. (References are to the sections contained in AB 2919 (Greene).

1. As to the requirements of section 1296.2 that County Clerks file a request that a screening panel hear a claim for damages, County Clerks would file the documents, they would be numbered and indexed for control purposes and placed in file. This represents additional work for staff.

2. Section 1296.2 further requires the mailing of a copy of the request to the physician and surgeon by registered mail, return receipt requested. Registered mail is one of the safest means of insuring that mail reaches its destination, however, it is one of the slowest due to the "logging in" process used by the post office. The main problem with registered mail is that it is nearly twice as expensive as certified. This additional cost would be borne by the County Clerk.

3. The Clerk would be required to file the physician and surgeon's response, which would create additional work.

4. Section 1296.3 would require the County Clerk to devise a method of informing the Presiding Judge, or his designee that a claim has been filed, which would be additional record keeping.

5. Section 1296.5 would require the processing of pre-hearing discovery papers. County Clerks would file these papers and insure that the documents be placed in the screening panel file. In addition, the Clerk would set the matter for hearing and notify parties (1296.6). Further, the Clerk would be required to maintain all exhibits that were admitted (1296.8).

September 10, 1980

Hon. Jack Fenton

6. Sections 1296.9 and 1297.1 require the screening panel to decide upon the existence or absence of liability. The record of that decision would thereafter be maintained by the County Clerk. Should the record show the existence of liability then the regular court process would begin. However, if it is found there was no liability what would become of the records? Would they be kept indefinitely the same as court records? Or could they be disposed of?

7. Our final point is that all of this work would be assumed by the County Clerk without reimbursement. It appears that some counties would be required to add staff to just handle these matters. If it is found that legislation is in order to establish this "pre-filing" process then it is essential that a fee be required to help defray the expenses.

Sincerely,

J. A. Simpson

J. A. Simpson, County Clerk-Recorder
Chairman, Legislative Committee-Courts
County Clerks' Association

cc: Bob Hamm, Pres.
Ed Kerry, Judicial Council

EXHIBIT A

STATE CAPITOL
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California Legislature

Assembly Committee on Judiciary

JACK R. FENTON
CHAIRMAN

October 6, 1980

TO: Members of the Assembly Judiciary Committee

FROM: Rubin R. Lopez

SUBJECT: Pre-trial Screening Panels in Medical Malpractice Litigation

On October 14, 1980, the Assembly Judiciary Committee will hold an interim hearing on the use of pre-trial screening panels in medical malpractice cases. The hearing will focus on AB 2919 (Greene), which would establish a mandatory pre-trial screening process to be used in all medical malpractice actions against physicians and surgeons. The hearing is scheduled to begin at 9:30 a.m. in Room 2117 of the State Capitol in Sacramento.

The purpose of this memorandum is to provide background information that may be of interest to you in preparation for the hearing.

HISTORIC OVERVIEW

According to a U. S. Department of HEW study, between 1960 and 1970 nationwide malpractice insurance rates for surgeons rose 949.2 percent; rates for non-surgical physicians increased 540.8 percent; and hospital premiums increased 262.7 percent. (See U. S. Department of Health, Education and Welfare Pub. No. (OS) 73-88, Medical Malpractice; Report of the Secretary's Committee on Medical Malpractice 22, 38-40 [1973].) In the mid-70's the situation worsened. For example, premiums paid by physicians in some states rose more than 100 percent between 1974 and mid-1975. In California, physicians

spent 73 million dollars in malpractice premiums in 1974 while in 1975 they spent 122.9 million for the same coverage. (See Redish, "Legislative Response to the Medical Malpractice Insurance Crisis", 55 Texas Law Review 759, notes 1, 2 and 3 at 759-760 [1979]).

In response to this "malpractice insurance crisis" and the resultant threats of some health care providers to withdraw their services from the public, state legislatures adopted a variety of programs aimed at assuring that liability insurance would continue to be available to those who provide health care services. This "reform" legislation included: (1) limiting the amount of recovery by plaintiffs or the liability of individual health care providers; (2) reducing the statute of limitations applicable to malpractice claims; (3) establishing either compulsory or voluntary arbitration plans; and (4) establishing a pre-trial malpractice screening panel procedure.

It is the last of those legislative remedies that AB 2919 seeks to establish in California. Copies of the bill and the Committee analysis are attached for your consideration.

PRE-TRIAL SCREENING PANELS

Medical malpractice screening panels are relatively recent innovations. According to the proponents of these screening panels, they are designed to relieve the burdens on the tort system by sorting out unjustified or nuisance suits against health care providers and by expediting the disposition of meritorious cases at a prelitigation stage. At least thirty states have created pre-trial screening panels; However, in four states the screening procedure has been struck down by courts on various grounds. A list of the thirty states which have adopted statutes implementing a screening panel system is attached for your consideration.

The internal procedures and composition of these panels vary a great deal from state to state. For example, in at least 22 states, the parties in a malpractice action must submit claims to the screening panels before they file suit. In the remaining states, the statutes provide for voluntary use of the panels. Further, the statutes of 19 states make some provision for admitting the panel's decision in a subsequent court action. (See "Prejudicial Effect of Findings of Arizona's Medical Malpractice Review Panels", 22 Arizona Law Review 63 [1980].)

In spite of these variances, it can generally be said that medical malpractice screening panels consist of a judge, a lawyer and a physician, each of whom has an equal vote

regarding the panel's decision. A judicial officer, such as a presiding judge, administers the selection of members. The physician and attorney members are drawn from rosters of licensed professionals who may have been recommended to serve by local medical and legal societies. In some jurisdictions, parties are permitted to nominate some panel members.

The panel normally holds an informal but nevertheless adversary hearing. The judge member presides and makes a ruling on evidence and procedure. The rules of evidence are relaxed. Witnesses may be called and cross-examined. In most jurisdictions, panels are given the power to subpoena witnesses and documents. The panel decides issues of liability; however, in a few states the panel may also determine the amount of damage. Parties are permitted to proceed to a trial de novo after the screening panel procedures have been completed.

Screening panels must be distinguished from arbitration panels. Arbitration is a process whereby parties submit a controversy to a neutral party for final determination. The arbitrator (or arbitration panel) makes a final and enforceable ruling on the matter in lieu of a court trial and ruling. The pre-trial screening process can be distinguished from arbitration because the screening panels do not make final or binding determination of a claim. Screening panels make findings of fact regarding the merits of a claim, which the parties may or may not accept. As pointed out in one law review article, "Screening panels are not an alternative to the current tort system but an additional layer which requires the parties to go through an additional step before litigating the matter in a state trial court." ("The Constitutional Considerations of Medical Malpractice Screening Panels" 27 The American University Law Review 161, 167 [1977])

Screening panels were once considered a very promising approach to lessen the filing or pursuit of frivolous claims. However, in recent years their effectiveness has been questioned. In four states there have been successful court challenges to the screening process. Further, even in those states where panel systems have withstood constitutional challenge, administrative and backlog problems have frustrated smooth implementation of the screening process. Attached for your consideration is a copy of "Mediation Isn't Cure For Patients' Claims" by David M. Margolick which appeared in The National Law Journal, February 4, 1980.

Legal Issues Arising in the Use of Screening Panels

Proponents of medical screening panels claim that they are a relatively inexpensive means of eliminating the spurious claim at a pre-trial stage. However, the use of these panels raises several complex legal problems. Three major issues have been faced by courts in states where panels have been used:

(1) Does the application of a special procedure to medical malpractice claims interfere with an individual's access to the courts in violation of equal protection of the law?

(2) Does the vesting of a non-judicial panel with decision making authority violate constitutional doctrines of separation of powers?

(3) Does the admission of the panel's decision in a subsequent court proceeding unconstitutionally impair a malpractice litigant's right to a jury trial?

A. Access to the Courts

There is no doubt that when a plaintiff is required to submit a malpractice claim to a screening panel as a condition precedent to filing suit, his or her access to the courts is affected. The opponents of screening panels claim that panels add time and expense to litigation, thereby abridging the individual's access to the court and right to a jury trial. Critics of screening panels contend that both the due process and equal protection clauses of the Federal and State Constitutions are violated.

In considering these arguments, other jurisdictions are split in their conclusions. The equal protection issue was argued before the Florida Supreme Court in Carter v Sparkman, 335 So. 2d 803 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977). The court upheld the constitutionality of Florida's screening panel procedure on the ground that it was a valid exercise of the state's police powers. The court recognized that the pre-litigation burden on the claimant was severe but found that even though that burden "reaches the outer limits of constitutional tolerance", the screening panel requirement was a valid attempt to deal with a malpractice crisis. (Also see Comiskey v Arlen, 390 N.Y.S. 2d 122 [1976].) However, it should be noted that in 1980 the Florida

Supreme Court reexamined Florida's screening process and found that administrative problems in the screening panel procedures cause too great a delay in granting parties' access to the courts. This ruling resulted in the statute's being declared unconstitutional (Aldana v. Holub ___ Fla. ___ (1980). Similarly, in Mattos v Thompson and Franston, No. 124 E. Dist., Misc. decisions (1979), the Supreme Court of Pennsylvania held that the administrative delays in processing malpractice cases in the state's pre-trial screening process was too onerous a burden on the parties and was a denial of the plaintiff's access to the courts.

B. Violation of the Separation of Powers

California Constitution Article III, Section 3 provides:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

Critics of screening panels argue that the employment of judges and laymen in a joint adjudicative role on malpractice screening panels is a legislative encroachment upon the judicial power, i.e., the power of the judicial branch to weigh facts, apply the law to them and resolve the controversy. This problem is further complicated where statutes permit admission of the panel's decision in subsequent court proceedings (the latter issue will be discussed in greater length below).

In Wright v Central Du Page Hospital Association, 63 Ill. 2d 313, 347 N.E. 2d 736 (1976), the Illinois Supreme Court held that the state's malpractice screening panel violated constitutional separation of powers. The Illinois law allowed the physician and lawyer panel members to make conclusions of law and fact "according to applicable substantive law" over the dissent of the judge panel member. This provision, the Court found, empowered non-judicial members of the panel to exercise judicial function in violation of constitutional provisions vesting exclusive judicial power in the courts. However, other state courts have rejected challenges to panel systems based on separation of powers. In the states where panels have withstood an attack based on the separation of

powers theory, courts have compared screening procedures to necessary pre-trial settlement efforts. Further, these courts recognized that the panel's decisions were opinions or advisory and not final adjudications of the claims. (See Carter v Sparkman supra; Attorney General v Johnson, 385 Atl. 2d 57 (Md. 1978); State ex rel Strykowski v Wilkie, 261 N.W. 2d 934 [Wis. 1978].)

C. Admission of the Panel's Decision in a Subsequent Trial

The statutes of nineteen states make some provision for admitting a screening panel's decision into evidence in a subsequent court proceeding. Critics contend that when a screening panel's opinion is offered into evidence at trial, the effect is to unfairly influence the jury on the ultimate issue of the case, thereby denying litigants their right to a jury trial. Courts have recognized that one of the purposes of admitting a decision in a trial is to influence the jury and thus discourage needless litigation in medical malpractice claims. (See Halpern v Gozan, 85 Misc. 753, 756, 381 N.Y.S. 2d 744, 747 [1976].) Nevertheless, a number of state courts have upheld provisions which authorize admission of the panel's decision in a subsequent trial. A number of courts have relied on the theory that the jury remains capable of determining the ultimate questions of liability in spite of the admission of the panel's decision.

Even in Maryland, where the panel's decision is presumed to be correct upon admission, the State Supreme Court upheld the validity of the state's admission provisions. In Attorney General v Johnson, supra, the Maryland Supreme Court held:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law: In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained [Citations omitted.] as have many other state and

> Federal enactments establishing other rebuttable presumptions. [Citations omitted.] An instructive case upon the subject is Holmes v. Hunt, 122 Mass. 503, 23 Am. Rep. 381, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in nowise inconsistent with the constitutional right of trial by jury.

It must be recognized that in most states where panels have withstood constitutional challenge, the courts acknowledged the existence of a "malpractice crisis" which dictated that state legislature be given greater latitude in solving the problem.

AB 2919 AND THE OCTOBER 14 HEARING

AB 2919 (Greene) was to be heard by the Committee on April 9, 1980. At the request of the author, the bill was referred to interim study at that time. The October 14, 1980 hearing will focus on AB 2919. In an effort to solicit testimony regarding both the positive and negative aspects of medical malpractice screening panels, Committee staff has asked witnesses to address the following issues:

1. What problems exist in resolving medical malpractice claims that would necessitate the establishment of a unique screening procedure? Do existing court procedures fail to adequately handle malpractice litigation?

2. Would the screening of malpractice claims be a more economical method of handling malpractice cases? What costs would be involved in using a pre-trial screening process? Would a screening process result in a more expeditious handling of malpractice cases? What additional burden is placed on the courts by pre-trial screening panels?

3. What legal issues are raised by establishing a medical malpractice pre-trial screening process?

4. What has been the experience in other states where screening panels have been established?

EXHIBIT B

AMENDED IN ASSEMBLY APRIL 8, 1980

CALIFORNIA LEGISLATURE—1979–80 REGULAR SESSION

ASSEMBLY BILL No. 2919

Introduced by Assemblyman Greene

March 6, 1980

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Title 9.2 (commencing with Section 1296) to Part 3 of the Code of Civil Procedure, relating to health, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2919, as amended, Greene (Jud.). Malpractice screening panels.

Under existing law, parties may voluntarily submit civil disputes to arbitration. Additionally, existing law requires the arbitration of certain claims in certain courts prior to trial.

This bill would require the ~~pretrial~~ submission of claims against physicians and surgeons based on a medical injury to a screening panel *prior to filing a complaint.* The panel would be composed of a judge, an attorney, and a physician. The panel's decision as to nonliability would be binding if a party does not ~~request to proceed~~ *file a complaint* within 60 days, in which case the decision would be admissible. The panel's decision as to liability would be admissible at trial. The bill would enact related provisions.

Section 2231 of the Revenue and Taxation Code requires the state to reimburse local agencies and school districts for costs mandated by the state. The section also specifies the manner for paying the reimbursement and requires any

statute mandating the costs to contain an appropriation to pay for the costs in the initial fiscal year. This statutory provision will be supplemented by a constitutional requirement of reimbursement effective for statutes enacted on or after July 1, 1980.

This bill appropriates an unspecified sum to the Controller for allocation and disbursement to local agencies and school districts for costs mandated by the state and incurred by them pursuant to this act.

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Title 9.2 (commencing with Section 1296) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 9.2. MALPRACTICE SCREENING PANELS

1296. In this title, the following terms have the meanings indicated, unless the context of their use requires otherwise:

(a) "Screening panel" means the panel selected pursuant to Section 1296.3.

(b) "Court" means the court in which the action is filed or transferred pursuant to Section 1297.4.

(c) "Medical injury" means injury or death arising or resulting from the rendering or failure to render health care.

(d) "Physician and surgeon" means a physician and surgeon licensed pursuant to Chapter 2 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Initiative Act.

1296.1. No claim for damages against a physician and surgeon because of a medical injury shall be filed in any court in this state on or after January 1, 1981, unless the ~~plaintiff requests in the complaint that the claim be heard by a screening panel as provided by this title.~~

~~1296.2. No claim for damages against a physician and surgeon because of a medical injury, which is filed on or after January 1, 1981, shall be tried unless a screening panel has heard and decided the claim as provided in this title.~~ *claim has been heard and decided by a screening panel as provided by this title.*

1296.2. (a) A person seeking to recover damages because of a medical injury shall file a request that a screening panel hear the claim for damages with the clerk of the superior court in which a complaint would have been filed. Such request shall generally state the type and alleged cause of injuries, and shall set forth the name and address of the physician and surgeon alleged to be liable for the injuries.

(b) The clerk shall mail a copy of the request to the physician and surgeon by registered mail, return receipt requested. If no receipt is returned, the clerk shall notify the complainant, who shall then give notice to the physician and surgeon in the manner required for the service of a summons. A screening panel shall not be selected until the clerk has received a return receipt for service by mail or proof of service from the complainant.

(c) The physician and surgeon may file a response setting forth why he or she is not liable to the complainant.

(d) The clerk shall notify the parties of the procedures relating to the screening panel.

1296.3. Within 60 days after a claim subject to this part is filed, the presiding judge of the court, or such other judge as is designated by the presiding judge, shall select a screening panel composed of the following:

(a) That judge.

(b) An attorney selected by the judge from a list submitted by a local bar association designated by the judge.

(c) A physician and surgeon selected by the judge from a list submitted by a local medical or medical specialty society. Such physician and surgeon shall be a recognized specialist or practitioner in the type of practice involved in the action.

1296.4. The physician and surgeon and the attorney members shall be persons willing to serve without compensation, and shall not be compensated.

1296.5. The judge shall hear all prehearing matters relating to discovery. It is the intent of the Legislature that the hearing should be expeditious and relatively informal, and therefore that discovery should be limited to such matters as are probably necessary for the hearing.

1296.6. The hearing shall be scheduled as soon as possible after the screening panel is formed.

1296.7. The judge shall have the powers of a neutral arbitrator set forth in Sections 1282.2, 1282.6, and 1282.8, and the provisions of such sections shall be applicable to such hearing.

1296.8. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.

1296.9. The screening panel shall render a decision within 10 days of the end of the hearing. The decision shall be limited to the existence or absence of liability. A dissent may be filed.

1297. If the screening panel determines that there is no liability, that determination may be reviewed by filing ~~a notice that a party intends to proceed with the action~~ *a complaint* within 60 days after the decision is rendered. If no ~~notice is filed, the decision shall be deemed accepted and the court shall enter a judgment of dismissal.~~ *complaint is filed within 60 days, any cause of action against the physician and surgeon because of the alleged injury shall be barred.*

~~1297.1. If a notice of intent to proceed with the action~~ *1297.1. If a complaint* is filed, the findings of the panel shall be admissible at trial and shall be treated as expert testimony.

1297.2. If the screening panel determines that there is ~~liability, the action shall proceed as otherwise provided,~~

liability, a complaint may be filed within 60 days and the findings of the panel shall be admissible at trial and shall be treated as expert testimony.

1297.3. The judge who is a member of the screening panel shall not preside at any subsequent hearing or trial of the same case.

1297.4. No member of the screening panel shall be liable for damages for any act or statement made as a member of the panel.

1297.5. At any time before a panel is formed, a party may move the ~~court~~ *judge designated pursuant to Section 1296.3* for a transfer of the case to another court as otherwise provided by law.

SEC. 2. The sum of _____ dollars ($_____) is hereby appropriated from the General Fund to the Controller for allocation and disbursement to local agencies and school districts to reimburse them for costs mandated by the state and incurred by them pursuant to this act.

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CALIFORNIA LEGISLATURE—1979–80 REGULAR SESSION

ASSEMBLY BILL No. 2919

Introduced by Assemblyman Greene

March 6, 1980

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Title 9.2 (commencing with Section 1296) to Part 3 of the Code of Civil Procedure, relating to health, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2919, as introduced, Greene (Jud.). Malpractice screening panels.

Under existing law, parties may voluntarily submit civil disputes to arbitration. Additionally, existing law requires the arbitration of certain claims in certain courts prior to trial.

This bill would require the pretrial submission of claims against physicians and surgeons based on a medical injury to a screening panel. The panel would be composed of a judge, an attorney, and a physician. The panel's decision as to nonliability would be binding if a party does not request to proceed within 60 days, in which case the decision would be admissible. The panel's decision as to liability would be admissible at trial. The bill would enact related provisions.

Section 2231 of the Revenue and Taxation Code requires the state to reimburse local agencies and school districts for costs mandated by the state. The section also specifies the manner for paying the reimbursement and requires any statute mandating the costs to contain an appropriation to pay for the costs in the initial fiscal year. This statutory provision will be supplemented by a constitutional requirement of

reimbursement effective for statutes enacted on or after July 1, 1980.

This bill appropriates an unspecified sum to the Controller for allocation and disbursement to local agencies and school districts for costs mandated by the state and incurred by them pursuant to this act.

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Title 9.2 (commencing with Section 1296) is added to Part 3 of the Code of Civil Procedure, to read:

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1296. In this title, the following terms have the meanings indicated, unless the context of their use requires otherwise:

(a) "Screening panel" means the panel selected pursuant to Section 1296.3.

(b) "Court" means the court in which the action is filed or transferred pursuant to Section 1297.4.

(c) "Medical injury" means injury or death arising or resulting from the rendering or failure to render health care.

(d) "Physician and surgeon" means a physician and surgeon licensed pursuant to Chapter 2 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Initiative Act.

1296.1. No claim for damages against a physician and surgeon because of a medical injury shall be filed in any court in this state on or after January 1, 1981, unless the plaintiff requests in the complaint that the claim be heard by a screening panel as provided by this title.

1296.2. No claim for damages against a physician and surgeon because of a medical injury, which is filed on or after January 1, 1981, shall be tried unless a screening

panel has heard and decided the claim as provided in this title.

1296.3. Within 60 days after a claim subject to this part is filed, the presiding judge of the court, or such other judge as is designated by the presiding judge, shall select a screening panel composed of the following:

(a) That judge.

(b) An attorney selected by the judge from a list submitted by a local bar association designated by the judge.

(c) A physician and surgeon selected by the judge from a list submitted by a local medical or medical specialty society. Such physician and surgeon shall be a recognized specialist or practitioner in the type of practice involved in the action.

1296.4. The physician and surgeon and the attorney members shall be persons willing to serve without compensation, and shall not be compensated.

1296.5. The judge shall hear all prehearing matters relating to discovery. It is the intent of the Legislature that the hearing should be expeditious and relatively informal, and therefore that discovery should be limited to such matters as are probably necessary for the hearing.

1296.6. The hearing shall be scheduled as soon as possible after the screening panel is formed.

1296.7. The judge shall have the powers of a neutral arbitrator set forth in Sections 1282.2, 1282.6, and 1282.8, and the provisions of such sections shall be applicable to such hearing.

1296.8. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.

1296.9. The screening panel shall render a decision within 10 days of the end of the hearing. The decision shall be limited to the existence or absence of liability. A dissent may be filed.

1297. If the screening panel determines that there is no liability, that determination may be reviewed by filing a notice that a party intends to proceed with the action within 60 days after the decision is rendered. If no notice is filed, the decision shall be deemed accepted and the court shall enter a judgment of dismissal.

1297.1. If a notice of intent to proceed with the action is filed, the findings of the panel shall be admissible at trial and shall be treated as expert testimony.

1297.2. If the screening panel determines that there is liability, the action shall proceed as otherwise provided, and the findings of the panel shall be admissible at trial and shall be treated as expert testimony.

1297.3. The judge who is a member of the screening panel shall not preside at any subsequent hearing or trial of the same case.

1297.4. No member of the screening panel shall be liable for damages for any act or statement made as a member of the panel.

1297.5. At any time before a panel is formed, a party may move the court for a transfer of the case to another court as otherwise provided by law.

SEC. 2. The sum of _____ dollars ($_____) is hereby appropriated from the General Fund to the Controller for allocation and disbursement to local agencies and school districts to reimburse them for costs mandated by the state and incurred by them pursuant to this act.

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ASSEMBLY COMMITTEE ON JUDICIARY
JACK R. FENTON, CHAIRMAN

Prepared by
R. R. Lopez

BILL DIGEST

BILL: AB 2919
(As amended 4/8/80)

HEARING DATE: 4/9/80

AUTHOR: Greene

SUBJECT: Malpractice Screening Panels

OBJECTIVE:

This bill is intended to establish a mandatory pretrial screening process to be used in all medical malpractice death and injury actions against physicians and surgeons.

BILL DESCRIPTION:

Under existing law, parties may voluntarily submit civil disputes to arbitration. In addition, last year legislation went into effect which established an experimental mandatory arbitration program for all civil cases in which the amount in controversy is less than $15,000.

This bill would require that all medical injury claims for damages against a physician and surgeon filed on or after January 1, 1981 be submitted to a screening panel prior to trial. Specifically, the bill provides the following:

1. No complaint for damages based on medical injury against physician and surgeon shall be filed after January 1, 1981 unless the claim has been heard and decided by the screening panel as provided by this bill.

2. A person seeking damages because of medical injury shall be required to request that the claim be heard by a screening panel. The bill also requires that the clerk send the physician and surgeon a copy of the filed request. No screening panel would be selected until the clerk has received acknowledgment or proof that the physician was served with the notice.

(CONTINUED)

3. Within 60 days after the claim is filed, the presiding judge or a designated judge shall select a panel. The panel shall be composed of the judge, an attorney from a list submitted by a local bar, and a physician and surgeon from a list submitted by a local medical society. The attorney and physician shall serve without compensation.

4. The judge shall hear all prehearing discovery matters. Although the hearing is intended to be informal and technical rules of evidence may not apply, the proceeding is to be conducted in a manner similar to existing statutory arbitration proceedings. Further, the judge shall have the statutory authority of a neutral arbitrator.

5. The panel shall render a decision limited to the existence or absence of liability within 10 days of a hearing. A finding of no liability shall become final unless within 60 days of the decision, a complaint based on the alleged injury or death is filed. If no complaint is filed, all subsequent claims are barred.

6. The judge who sat on the panel would not be eligible to hear the matter at trial.

The bill appropriates an unspecified sum from the General Fund for the purposes of this measure.

SOURCE:

Author

SUPPORT:

Unknown

OPPOSITION:

California Trial Lawyers Association
Judicial Council

COMMENT:

1. On July 1, 1979, a mandatory arbitration process for all civil cases where the amount in controversy is less than $15,000 went into effect. The Judicial Council and the Auditor General are to review and evaluate the effectiveness of that program. This bill would establish a separate screening program for

(CONTINUED)

handling malpractice claims against physicians and surgeons. Would it not be wise to evaluate the existing arbitration process to determine if the problems this bill seeks to resolve are adequately handled by the existing process? Is it sound policy to create a separate mandatory screening process for cases involving only one group of professionals? Further, since existing law requires mandatory arbitration of cases valued at less than $15,000 would this bill not subject those cases to two separate screening or arbitration systems? Should an amendment be offered to prevent the same case from being subject to two separate systems?

2. This bill would require that the presiding judge or the judge's designee sit on the medical malpractice screening panel. It also prohibits that judge from hearing the case in a subsequent judicial trial. Would this not cause administrative problems for smaller courts with few superior court judges? Further, the bill specifies that the physician and attorney panel members shall not be compensated. Is it practical to anticipate that members of these professions would be willing to volunteer time to serve without compensation?

3. This bill would require the screening of all medical malpractice claims against physicians and surgeons. It then defines physician and surgeon as one licensed pursuant to Chapter 2 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Initiative Act. However, Chapter 2 of Division 2 refers to chiropractors and commences with Section 1000, while Chapter 5, Section 2000 deals with the Medical Practice Act. It is unclear what specific medical professions the author wishes to cover in this bill.

4. This bill would require the screening process include an informal hearing which will be governed by some of the statutory provisions dealing with arbitration (Code of Civil Procedure Sections 1282.2, 1282.6 and 1282.8). However,the bill does not specifically guarantee that parties may be represented by counsel at these hearings. Should the parties right to counsel at the hearing be recognized?

5. This bill would prohibit the filing of any complaint involving a claim for damages against a physician and surgeon because of a medical injury, unless the claim was heard and decided by a screening panel. Although

(CONTINUED)

not specified by the bill, it is assumed that the clerk would be required to reject a complaint which did not contain such a request. Would this not exceed the ministerial responsibility of the clerk?

6. The bill provides that the decision of the screening panel would be admissible as expert testimony at any subsequent court trial. The opponents of the bill claim that to treat the panel's decision as expert testimony would be highly prejudicial. Further, opponents claim that since the panel may ignore rules of evidence, the admission of the decision may result in "expert opinion" at trial which is based entirely on inadmissible evidence.

OTHER STATE'S STATUTES ESTABLISHING SCREENING PANELS

Alaska	Alaska Stat. §09.55.536 (Supp. 1978)
Arizona	Ariz. Rev. Stat. Ann. §12-567 (Supp. 1979)
Arkansas	Ark. Stat. Ann. §34-2603 (Supp. 1978)
Connecticut	Conn. Gen. Stat. Ann. §38-196 (West Supp. 1979)
Delaware	El. Code Ann. tit. 18 §6803 (Supp. 1978)
Florida	Fla. Stat. Ann. §768.44 (West Supp. 1979) (Declared unconstitutional)
Hawaii	Haw. Rev. Stat. §671-11 (1976)
Idaho	Idaho Code §6-1001 (1979)
Illinois	Ill. Rev. Stat. ch. 110 §58.3 (Supp. 1979) Declared unconstitutional)
Indiana	Ind. Code §16-9.5-9-2 (1976)
Kansas	Kan. Stat. Ann. 65-4901 (Supp. 1979)
Louisiana	La. Rev. Stat. Ann. §40: 1299.47 (West 1977)
Maine	Me. Rev. Stat. Ann. tit. 24 §2802 (Supp. 1979-80)
Maryland	Md. Cts. & Jud. Proc. Code Ann. §3-2A (Supp. 1979)
Massachusetts	Mass. Gen. Law Ann. ch. 231, §608 (West Supp. 1979)
Missouri	Mo. Ann. Stat. §538 020 (Vernon Supp. 1979) (Declared unconstitutional)
Montana	Mont. Rev. Codes Ann. §17-1304 (Supp. 1977)
Nebraska	Neb. Rev. Stat. §44-2840 (1978)
Nevada	Nev. Rev. Stat. §41A. 020 (1977)
New Hampshire	N.H. Rev. Stat. Ann. §519-A:1 (1974)
New Mexico	N.M. Stat. Ann. §41-5-14 (1978)
New Jersey	N.J. Civ. Prac. R. 4:21 (1979)
New York	N.Y. Jud. Law §148-a (McKinney Supp. 1978-80)
North Dakota	N.D. Cent. Code §32-20.1-01 (Supp. 1979)
Ohio	Ohio Rev. Code §2711-21 (Page Supp. 1978)
Pennsylvania	Pa. Stat. Ann. tit. 40, §1301.510 (Purdon Supp. 1979-80) (Declared unconstitutional)

OTHER STATE'S STATUTES ESTABLISHING SCREENING PANELS (Continued)

Rhode Island	R.I. Gen. Laws §10-19-8 (Supp. 1978)
Tennessee	Tenn. Code Ann. §23-3409 (Supp. 1979)
Virginia	Va. Code §8.01-581.8 (Supp. 1979)
Wisconsin	Wis. Stat. Ann. §655.19(1), (2) (West Supp. 1979)